

A Theory of Denizenship

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I, Meghan Benton, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

Abstract

Political philosophers have generally assumed that all residents of states are citizens, and vice versa. But the changing face of migration from permanent, ‘settler’ migration to temporary, multiple migration means that ‘denizenship’ – the state of being a resident non-citizen – can no longer be considered anomalous.

Denizenship is clearly a less favourable status than citizenship. However, little has been done to explore this intuition. To the extent that immigration has been theorised, it has been according to three main dimensions. The first considers first admission, the second what rights denizens are entitled to, and the third what conditions states can set on citizenship acquisition.

Part 1 of my thesis examines and identifies the limitations with these existing approaches. I argue that, by identifying the problem of denizenship with the absence of legal rights, the rights approach cannot specify the conditions under which it is problematic for denizens to enjoy fewer of the rights of citizenship. It also takes insufficient account of the way in which states lack the incentive to protect their non-citizen population. The citizenship acquisition approach, on the other hand, is not sensitive enough to deal with the different claims of vulnerable groups of migrants.

In Part 2 I advance an alternative framework for addressing the problem of denizenship structured around the republican ideal of non-domination. First, I develop a conception of domination as dependence on unaccountable power. Second, I apply this conception to the case study of denizens and to different groups of vulnerable migrants. I find that denizens as a group are vulnerable to domination, and that they encompass vulnerability subgroups, including refugees and undocumented migrants. Finally, I outline features of a domination-reducing policy approach to migration. I suggest that domination can inform policies in four areas: improving the accountability of states to their non-citizen population; empowering denizens in their private relationships; reducing domination in immigration policy; and reducing arbitrariness in citizenship acquisition.

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Chapter 1 – Introduction

We are all familiar with stories of vulnerable migrants exploited by employers or landlords; unaware of their rights; cast adrift in a country where they lack knowledge of which institution or organisation they could seek help from; in fear of being reported to the authorities because they lack the correct papers; or coerced into certain actions by the threat of deportation, founded or unfounded. We also know that the immigration experience need not be like this. Many individuals live happily in countries where they lack citizenship: accessing public services; participating in trade unions, local political institutions and voluntary or religious associations; and living a ‘decent’ life in the same way as many citizens. Is there then something necessarily problematic about being a denizen – that is a resident non-citizen – in a liberal democratic state? Up to ten per cent of the population of liberal democracies is a denizen, someone who lacks legal citizenship or ‘nationality’ (in the international law sense of a passport, not ethno-cultural origin) of the state in which they live. Whether denizenship is problematic is therefore an apposite and timely question to ask. Many of us would share the intuition that denizenship is a less favourable status than citizenship, but philosophers have done little to explore why.

My argument, in essence, is that denizenship is a status of vulnerability to domination, defined as dependence on arbitrary – that is, unchecked or unaccountable – power. Under certain conditions it is not morally troubling, specifically if denizens have access to certain accountability mechanisms, and if their exit costs of leaving denizenship (either by leaving the state, or by becoming citizens) are sufficiently low. The contribution my thesis makes is therefore to determine the conditions under which denizenship is problematic. At one extreme, asylum seekers have limited access to accountability mechanisms - like diplomatic protection or voting rights - and very high exit costs of leaving the state. At the other end of the spectrum EU denizens have access to multilayered accountability mechanisms and low exit costs of leaving the state as they have a range of opportunities and rights elsewhere.

My thesis also makes a distinct contribution to republican political theory. The fit of republican theory with modern conditions of pluralism is under consideration as part of the evaluation of the “republican revival”. Republicanism as an approach shares much with liberalism, but is characterised by a distinctive theory of liberty as non-domination and an emphasis on the conditions for civic virtue and self-governance. By showing that republican values can be applied convincingly to immigration theory, I hope to show that republicanism is neither an ‘archaic rhetorical skin for a body of modern liberalism’ or ‘overtly oppressive to a troubling degree’ (Brennan and Lomasky 2006: 222). My definition of domination borrows much from other domination theorists, but it contributes a novel, additional component: it demonstrates how the

subjective exit costs of leaving the state can make individuals more or less vulnerable to both state and private domination.

One of the limitations with my core argument is that my attempts to articulate how the situation of groups of denizens differs may have eclipsed my original intuition that there is something distinctive about denizenship in general. I focused on the variation in the status of groups of denizens in order to avoid assuming that denizenship is problematic by definition. In the course of my PhD I realised that the original problem motivating this research – that denizenship is a status of (at least national-) political disenfranchisement – was superseded in importance by specific and more acute forms of domination of subgroups of denizens. The vulnerability to domination constituted by denizenship is a distinct problem from the forms of domination that some members of this group are vulnerable to, and it would be misleading to suggest that these particular forms of domination stem from non-citizen status as such. The extent to which I have provided a ‘theory of denizenship,’ rather than a theory of different forms of migrant vulnerability, might now be questioned.

The ‘theory of denizenship’ that I have sought to develop can therefore more accurately be described as two connected, but distinct, theses. The first thesis is that denizenship is a status of vulnerability to state domination because of the absence of national political rights. My argument in this respect is that political exclusion is not necessarily problematic provided the exit costs for denizens leaving the state are low, and they have access to alternative accountability mechanisms. The second is that some subgroups of denizens are especially vulnerable to private forms of domination such as exploitation by landlords and employers. Immigration status might exacerbate private domination but it does not cause it, and disadvantaged citizens are subject to similar types of domination. Nevertheless, I do wish to argue that there is a link between these two forms of domination: the central role played by the exit costs of leaving the state. I will argue that both forms of domination are increased to the degree that denizens’ exit costs of leaving the state are increased. I hope that my concept of exit costs will succeed in showing that immigration status – or lack of it – should be high on both republican and other political theorists’ agenda in considering factors which shape an individual’s ability to live a full, independent, flourishing life.¹ Although the landscape of immigration theory is less sparsely populated than it was when Seyla Benhabib (2004: xiii) remarked that immigration had been given ‘scant’ attention by political

¹ It is outside the scope of this thesis to define human flourishing, so I will adopt Lovett’s (2010, p. 131) definition, adapted from Nussbaum, of ‘success in achieving autonomously formulated, reasonable life plans, through fellowship or community with others, over a complete life’. I will say more about the conditions for an independent life, specifically, one free from domination, in Chapters 5, 6 and 7. My point here is that *whatever* the conception of the good of particular philosophers, immigration status is likely to have a significant influence over individuals’ ability to realise it.

philosophers, it has been significantly dominated by the question of legitimate border controls or ‘first admissions’. The drawback to this preoccupation with admissions is that it is only one dimension of exclusion in immigration policy. Citizenship does not only draw an external boundary between members and outsiders through the physical borders of the state. It also delineates an internal status boundary between resident non-citizens or ‘denizens’ and citizens (Cole 2009a). More recently, awareness of this other point of ‘closure’ has provided the impetus for the development of a second main field of interest: admission to citizenship. But even in the presence of a right to become a citizen, philosophers acknowledge that denizens raise a moral problem by virtue of their existence. Denizens are “subjects” in democratic theory terms, since to lack the legal status of a citizen is to lack political status as a democratic rights-holder, and subjects are troubling for democrats as they are subject to laws they have no say over. The existence of both a citizen and subject population is also perturbing for anyone who cares about equality and is suspicious of hierarchical or caste-like systems. As Rainer Bauböck (1994: 203) poses the dilemma, ‘[d]o not states of immigration with a large and growing disenfranchised alien population fail to meet the norm of inclusion which characterizes liberal democracy?’. Numerous aspects of immigrant policy in a democracy are problematic if their supposed legitimacy derives from being the outcome of majoritarian decision-making because ‘they render problematical assumptions about who constitutes the appropriate demos for majoritarian decision’ (Shapiro and Hacker-Cordon 1999: 1).

Taken together these two *prima facie* concerns constitute the ‘problem of denizenship’: the existence of a subordinate, second-class group in countries committed to equal citizenship, and the fact that only the more favourable status confers the right to share in the collective determination of laws. Commenting on the narrower but related category of the ‘guestworker’, Michael Walzer (1983: 59) described this as akin to domination: ‘government of guest workers looks very much like tyranny: it is the exercise of power outside its sphere, over men and women who resemble citizens in every respect that counts in the host country, but are nevertheless barred from citizenship’.

Despite the starkness of this problem, little has been done to explore the status of denizenship itself. Moreover, the problem in some respects seems *too* stark: the political exclusion of denizens cannot be *necessarily* problematic because we do not worry about the fact that transients and tourists are subject to laws they have no say over. A related worry is that the characterisation of denizens as second-class citizens is also somewhat rhetorical, if not tautological. That they are not legal citizens does not necessarily entail that they occupy an inferior status. For example, Walzer’s characterisation of rule of denizens by citizens as ‘tyranny’ is reinforced by his characterisation of the status of denizenship as *permanent*, but there is no account of whether permanent exclusion

from citizenship is what makes this situation tyrannous.

I: Denizenship and Citizenship

The state of *lacking* citizenship should be of central interest to political philosophers, as ‘citizenship’, in its numerous different ways, has been a key area of scholarship for the last two decades. Political philosophers have examined the way in which, as a legal status, citizenship determines the configuration of legal rights and duties between individual and state. They have examined the way in which, as a political status, it confers the right to participate in making collective decisions that shape our communal existence. And they have examined the way in which, as a demarcator of membership, it sets out what it means to belong. Kymlicka and Banting (1994: 352) remarked in 1994 that citizenship had ‘become the “buzz word” among thinkers on all points of the political spectrum’. Sixteen years later, this upsurge in interest in citizenship shows no signs of slowing. Policy-makers have also seized on the “citizenship turn”, with citizenship promoted in schools, and citizenship tests introduced to the naturalisation process. The language of citizenship now pervades political discourse. Moreover, the terminology of the citizen has permeated into schools of thought not traditionally associated with civic concerns, including feminism and multiculturalism (Bosniak 2006). As Richard Bellamy (2008a: 1) explains, ‘[w]hatever the problem – be it the decline in voting, increasing numbers of teenage pregnancies, or climate change – someone has canvassed the revitalization of citizenship as part of the solution’. In fact, ‘[d]escribing aspects of the world in the language of citizenship’ has become a ‘legitimizing political act’ (Bosniak 2006: 12).

But the scrutiny and idealisation of citizenship has not been matched by scrutiny of its absence. Citizenship has at least four dimensions: legal status or nationality, configuration of rights and duties in relation to the state, psychological membership or identity, and social and moral responsibility. Denizenship – the status of lacking the first, legal dimension – has a clear bearing on the other dimensions. The moral question of what rights denizens should be granted is both a question about the extent to which citizenship should constitute privilege (in contrast to protection of the person through human rights), and a descriptive question about the extent to which denizens have been included as members. Denizens might, in legal terms, be stateless – literally, citizens of nowhere – or they might be citizens of somewhere else. This legal description also already encompasses the membership and identity aspect of citizenship. We understand the term “citizen of nowhere” only because it is a subversion of traditional nation-state assumptions about belonging.

The existence of denizens also challenges the supposed universalising potential of citizenship. Linda Bosniak (2006: 1) describes how, as an ideal, ‘citizenship is understood to embody a

commitment against subordination’ but because it attaches to individuals to signify membership of an in- or out-group it ‘can also represent an axis of subordination itself’. Denizenship on the other hand, or what Bosniak calls ‘alienage’, subverts the view that citizenship is ‘hard on the outside and soft on the inside’ as even once immigrants have become residents of the state ‘they remain outsiders in a significant sense: the border effectively follows them inside’ (4). As both insiders (territorially) and outsiders (of membership) denizens are a reminder that the flip-side of citizenship as equalising status is a *less* equal status for those who lack it. A similar point is made by Jo Shaw (2007: 20) who argues that, ‘citizenship appears to be a universal status, a badge of personhood, based on an irreducible and enforceable commitment to equality; yet, at the same time, it is commonly used as a means of defining the particular and of delineating the inside from the outside. In other words, by its very essence, the ascription of citizenship could be seen to be a recognition of inequality or at least difference’.

Yet at the same time as reaffirming hierarchy and difference the extent that non-citizens are in some crucial ways *like* citizens also informs the concept of citizenship itself. If formal citizenship ceases to be a precondition for the enjoyment of its benefits then citizenship can no longer be understood as ‘a unitary or monolithic whole’ (Bosniak 2006: 3). Immigration, and hence denizenship, reconfigures many of the central dimensions of the ideal-type of citizenship. According to Brubaker (1990: 380), there are six ‘membership norms’: that citizenship is unitary (all citizens should have full rights and obligations); sacred (citizens obtain their status from being willing to make sacrifices for one another or the state); national (citizenship is of a simultaneously political and cultural community); unique (each citizen belongs to one and only one political community) and consequential (citizenship confers entitlements which differentiates members from non-members). Practices like dual citizenship and granting rights independently of citizenship indicate that the ideal-type is out of step with contemporary realities. Bosniak (2006: 3) makes a more general point: ‘it is not necessarily incoherent to speak of the “citizenship of noncitizens”’.

In fact, the term ‘denizen’ was introduced in immigration theory to emphasise the *convergence* between the legal rights of permanent resident non-citizens and citizens, rather than the imbalance in their statuses. In the late 1980s, Tomas Hammar (1989: 84) revived this ‘old English word’ to designate long-term or permanent resident non-citizens with many of the entitlements of citizenship. Previously the literature had referred to ‘guestworkers’ or merely ‘migrants’ (see Walzer 1983). This linguistic shift paralleled a shift in theorists’ focus from the most vulnerable migrants to relatively well off groups, but also a shift in policy terms from the view that guestworkers as temporary migrants could be barred from acquiring citizenship and from rights such as family reunification to the acknowledgement that guestworkers had evolved into

permanent members, particularly in Germany where the term originates. Immigration scholars like Yasemin Soysal (1994: 1) contended that ‘universal personhood’ had become the primary criterion for rights in liberal democracies. This view challenged the tight association between rights and citizenship as exemplified by T H Marshall’s (1964) tripartite schema of citizenship rights. It also implied that Hannah Arendt’s (1967: 297) oft-quoted claim that citizenship is the ‘right to have rights’ had become outdated; the development of the human rights framework meant that citizenship was no longer necessary to be a legal, rights-holding person.

This thesis builds on the tensions in the status of denizenship by seeking to establish under what conditions it becomes problematic. It starts from the intuition that the status of denizenship is less favourable than citizenship, but also from the belief that narratives that emphasise either the security of status of permanent residents or the vulnerability of guestworkers oversimplify normative questions in immigration theory. Clearly, there is substantial divergence in the situations faced by different groups of denizens, and to argue that denizenship is necessarily, or even definitionally problematic, is as fallacious as to suggest that possession of citizenship is a sufficient condition for a decent life. The challenge of this thesis is to analyse whether there is anything common to the experience of denizenship, while pinpointing the factors which shape the experience of different groups of denizens.

II: Denizenship in the Literature

Although philosophical interest in immigration is relatively new, the idea of the non-citizen has a long pedigree in law and philosophy. The term ‘denizen’ itself has a particularly British heritage. The dictionary definition highlights the practice of ‘denization’ in archaic British law. It describes a denizen as ‘[o]ne who lives habitually in a country but is not a native-born citizen; a foreigner admitted to residence and certain rights in a country; in the law of Great Britain, an alien admitted to citizenship by royal letters patent, but incapable of inheriting, or holding any public office’ (Oxford English Dictionary 1989). This process of receiving privileges of British subjecthood through royal prerogative was introduced by an Act for Denization in 1601 and appeared as late as 1914 in the British Nationality Act (Berry 1944: 491-2). Elsewhere the term was used rather differently; Koessler (1946) describes how before the Declaration of Independence the terms ‘subject’ and ‘denizen’ were often used in place of citizen.

However, the features of the legal understanding of denizenship in early modern law reflected much older categories: metics, and the Roman *cives sine suffragio*. Edmund G Berry (1944: 490-2) explains that the state of denizenship was close to *civitas minuto iure* or *sine suffragio*, the status of second-class Roman citizenship accorded to non-Latin or non-resident groups. This status conferred the rights of *provocatio*, *commercium* and *conubium* only – protection against coercion,

property rights and family rights – while the vote was restricted to first-class citizens with *civitas optimo iure*. Drawing links between this practice and denizenship, Berry contends, ‘[i]t seems a curious parallel with the Roman idea that citizens could be divided into full citizens and half citizens’ (492).

In philosophy the term ‘denizen’ or ‘denison’ has also been used to refer to ‘half’ citizens. Locke (1991 Paragraph 27: 23) used the term to describe native citizens who had not expressly but only tacitly consented to the state, through residence. Blackstone (1769 Book 1, Chapter 10: 362), on the other hand, described a denizen as ‘a kind of middle state, between an alien and a natural-born subject, and partakes of both’. Blackstone argued that allegiance from a denizen was due only as long as they were within the king’s dominion whereas the allegiance of a native citizen was perpetual. Locke’s use of the term denizen sets up one of the problems that denizenship raises for political philosophy: the question of political obligation, or why (and whether) we have an obligation to obey the law. Michael Walzer (1970: 105), drawing on consent theory, argues that there is a parallel between ‘aliens’ and the ‘alienated’ in examining the question of whether the politically disenfranchised, like aliens/denizens, are exempt from the obligation to perform military service.

As set up by Simmons (1979: 31), one of the most prominent political obligation theorists, however, political obligation is a problem between *citizens* and the state, not denizens and the state. The “particularity requirement” states that a valid theory of political obligation should explain why citizens have an obligation to obey their institutions in particular. Denizens are curiously absent from this understanding, given that they are called on to obey the laws of their state of residence far more often than the laws of their state of citizenship.² In contrast, Jeremy Waldron (1993) defends Rawls’s idea of duty to just institutions in the context of exploring what individuals owe to governments of countries which are not their own, arguing what matters is that institutions ‘apply to us’. Although the political obligation of denizens raises interesting questions, it is unfortunately beyond the remit of this thesis to examine this issue properly as it would necessitate study of a much broader category of non-citizen including visitors and tourists (as in Waldron’s example of the political obligation of a captain of a ship anchored in a foreign port).

The term “denizen” entered the language of immigration theory much later. Hammar (1989) first used the term to refer to long-term residents with many of the rights of citizenship, but not the

² Although Simmons (2001) does consider the implications of Locke’s use of the terminology of ‘denison’ and position on the tacit consent of foreigners in his “‘Denisons” and “Aliens”: Locke’s Problem of Political Consent’.

right to vote. Atushi Kondo (2001: 229) highlights how different interpretations and translations have led to emphasising different categories of non-citizen, from the German *'wohnbürgerschaft'* (residential citizenship) to the Japanese *'ejū shimin'* (permanent-resident citizenship). In the United States, the legal term 'alien' has been more commonly used, and it refers more widely to all resident non-citizens. Unlike the analyses of denizenship above, which build permanence into their definition, 'alienage' is understood as the status inhabited by any non-citizen. A recent book examining alienage by Linda Bosniak (2006) highlights the tension between its shared features and its internal variation. Bosniak explains that, unlike other groups, non-citizens rarely self-identify as such, other than to explain their bureaucratic status. There are differences of legal status, including the legal/undocumented divide and the difference between permanent and temporary status, but also traditional social differences including gender, ethnic, national, racial and class distinctions 'that affect noncitizens' experiences in ways that frequently compound, and frequently ameliorate, the disadvantage associated with alienage status' (10). Bosniak concludes that the shared features of alienage, including liability to deportation, lack of voting rights, and limited access to welfare, makes it the overarching status that shapes non-citizens' lives.

Bosniak also observes how alienage has been predominantly ignored in the literature. 'Strikingly, these particular forms of disadvantage have often been overlooked by theorists who engage the subject of social subordination in general terms. In the critical literature across the disciplines, it is common to come upon laundry lists of the vectors of subordination – such as race, ethnicity, gender, class, sexual orientation, religion, disability, and appearance – that fail to include or even acknowledge the category of alienage' (10). Like Bosniak, I do not assume the legal entitlement to permanent residence in my study of non-citizens; indeed like Bosniak, I wish to include consideration of migrants who lack legal documentation. Henceforth, I will refer to this state of being a non-citizen, regardless of immigration or residency status, as 'denizenship'. I choose this term because of the negative connotations of alienage, and because alienage as a concept is specific to United States Law.

Other than this book-length treatment, most approaches to denizenship have been indirect, exploring the moral claims made by resident non-citizens rather than the status of being a non-citizen as such. From a legal or sociological perspective, comparative studies of the rights accorded to denizens have tended to evaluate progress in formalising a human rights framework (Soysal 1994), or the evolution of legal norms and immigrant rights in different countries (Aleinikoff 2000, Feldblum 2000, Joppke 2001, Kondo 2001). Gerald Neuman (1996) undertakes a constitutional history of aliens' rights. Similarly, comparative studies of citizenship acquisition have illuminated denizenship by contrasting different policy approaches and understandings of what it means to be a citizen in different countries (Brubaker 1989b, 1992). Immigration scholar

Joseph Carens (1987, 1989, 2010) has made one of the most significant contributions to the literature on immigration by writing on each of the three steps of claims made by non-citizen: entry claims, rights claims and citizenship claims. Seyla Benhabib (2004) approaches the same sorts of questions from a democratic, discourse theoretical perspective. Other theorists have examined citizenship acquisition as a stand-alone issue (Bauböck 1994a, Seglow 2009, Hampshire 2009, Honohan 2009, Pickus 1998, Van Gunsteren 1988).

More recently, the development of the EU and free movement law has prompted the introduction of scrutiny of ‘Euro-denizens’, citizens of a member state residing in another member state. Philippe Schmitter (2000) sees the standardisation of member state policies towards denizens as part of the trend of reconfiguring the state-denizen relationship alongside the state-citizen one. Others have noted the widening gulf between the privileged entitlements of these EU denizens and the status of third-country nationals (Maas 2008, Aleinikoff and Klusmeyer 2002).³

A new field of literature examines the claims of groups of migrants who challenge the traditional model of one-way once-only ‘settler’ migration. Some of the same theorists who originally examined the citizenship rights of migrants as a whole group are now working on more complicated issues raised by the existence of these new groups. For example Carens (2009, 2008b, 2008c) has published several papers on irregular migrants and seasonal workers. Bauböck (2009) has introduced the concept of ‘external citizenship’ to describe how migrants’ legal status and rights are determined in part by the policies of their sending countries, as well as their countries of residence. He contends that “[d]enizenship” and long-term external citizenship are ... two sides of the same coin, and the value of this coin in terms of rights and opportunities cannot be determined by looking at one side only’ (477).

The question of the claims of non-citizens is therefore a hot topic in immigration theory. Nonetheless, little work has been done as yet to compare the claims of these different groups with one another in order to draw conclusions about the status of denizenship, and when it is, or is not, a problem. The main contribution of my thesis is to synthesise these disparate fields, but the ideal that connects them is new to immigration theory: the republican concept of non-domination.

³ Third-country nationals have not, however, been entirely ignored in EU legislation. See Council Directive 2003/109/EC of 25 November 2003 on the status of third-country nationals who are long-term residents .

III: Research Questions and Objectives

The aim of my thesis is ambitious: I seek to develop a *theory of denizenship*. This means that I wish to identify what the status of denizenship is, determine the conditions under which it becomes normatively problematic, and consider what we can do about this. To develop my theory, I construct a conceptual framework that can be applied to different groups of denizens in order to determine whether their situation is morally troublesome. I then show how this conceptual framework can underpin policies to improve the position of denizens. The framework will bridge two distinct, as yet unrelated fields of literature: immigration theory, and the republican theory of freedom as non-domination (dependence on arbitrary power, which I define as unaccountable power). Republicans have historically said very little about immigration. Likewise, the potential for the ideal of non-domination to inform the status of migrants as non-citizens has not been explored, as non-domination has been so closely identified with citizenship. The development of my framework will therefore entail an examination of existing immigration theory to demonstrate its limitations in responding to the problem of denizenship, and then an analysis and endorsement of the potential for non-domination to deal with denizenship more successfully.

My central argument is that denizenship is problematic if two conditions obtain; first if denizens are subject to power that is insufficiently checked by accountability mechanisms, and second if they are highly dependent on these relationships of power - if their exit costs of leaving the relationship are high. This is because relationships of power constituted by high exit costs and low accountability are *dominating*, meaning that they enable the abuse of power. Even if power is not abused, the fact that it is unchecked means that those subject to it have their choices curtailed by their susceptibility to interference. I maintain that the status of denizenship is one indicator of vulnerability to domination, but additional dimensions of immigration status such as undocumented status, asylum status, dependent migrant status and certain types of temporary migrant status represent additional layers of vulnerability.⁴ At one extreme, asylum seekers or undocumented migrants are constantly exposed to the risk of detention or deportation yet have very limited access to mechanisms of accountability that check how the state wields these powers. Undocumented migrants are also deeply vulnerable to exploitation and abuse at the hands of employers and others who are able to manipulate their immigration status to extract additional work, favours or money. At the other end of the spectrum, EU denizens occupy a status of ‘super

⁴ I use the terms ‘undocumented’ and ‘irregular’ interchangeably to refer to migrants who lack the legal right to stay in their country of residence. I use the term ‘refugee’ to refer to someone who fears persecution in their home state, whether or not they have legal refugee status. I define this more fully in Chapter 2. The term ‘asylum seeker’ refers only to applicants for refugee status who have not yet been granted the right to stay. ‘Dependent migrants’ are discussed in detail in Chapter 6 as a special case, and not referred to until then. Finally, ‘temporary migrant status’ refers to migrants granted temporary leave to remain, including for seasonal or temporary employment.

denizenship', with local and European-level political rights, multilayered accountability mechanisms through the EU, and national-level diplomatic protection. My argument is that lack of accountability mechanisms is problematic, but the problem is amplified to the extent that someone's exit rights of leaving the country increase. Hence an EU denizen might not raise concerns if they have lived in another member state for 12 months, but after 20 years of residence the accountability gap between denizens and citizens, even relatively well off EU denizens, becomes significant.

I develop my argument in two stages. In Part I of my thesis I demonstrate that the existing approaches provide inadequate responses to the problem of denizenship. First because they lack an account of the way in which political powerlessness, social hierarchies and anti-immigrant culture shape rights provision for certain migrants, and second because they are insufficiently sensitive to the different claims raised by different groups. Access to citizenship, even if under relatively few undemanding conditions, is not enough to allay our concerns about the problem of denizenship. This is because of the variations in exit costs of leaving the state, and of leaving the state of denizenship (by acquiring citizenship), for different groups of migrants. In Part II, I apply my revised account of domination to denizens to demonstrate how the structural features obtain for denizens as a whole and for certain subgroups of denizens. This involves developing my own version of the republican conception of domination independently of the case study of denizens; then applying this to denizens as a whole and subgroups of denizens, including demonstrating how the dimensions of domination are played out in practice through the use of mini case-studies; and finally advocating a policy approach inspired by the idea of non-domination.

IV: Structure

The structure of my thesis is as follows. In the first of its two parts, I make the case for considering the problem of denizenship by showing that our intuitions about denizens are not adequately dealt with by existing approaches within immigration theory. I examine the three main debates in immigration theory: admissions, rights and access to citizenship. I examine admission policy in order to consider the preliminary question of who denizens are and should be in liberal democracies. I then turn to existing answers that have been given to the problem of denizenship, first that denizenship is a problem to the extent that it constitutes the imperfect institutional realisation of the moral rights of individuals, hence that they do not raise a significant moral problem provided they are granted a substantial package of rights; and second that denizens do not raise a significant moral problem if access to citizenship is fairly undemanding after a certain period of time, in other words, if they are ultimately given the right to exit their status of denizenship and become citizens.

Chapter 2 considers admissions policy, by examining and evaluating the open borders debate. The aim of this chapter is threefold. First I aim to contribute to the debate on border policy, which I see as problematised by the polarised arguments on both sides and the gap between what is required by liberal universalist principles, and the practices of liberal democracies. Second, it provides a defence of the starting point and assumptions made by my thesis of real-world bounded political communities with the (qualified) right to control their borders. Third, it sets up the more direct engagement with my research questions in subsequent chapters by answering the preliminary question: who are denizens? In other words, I seek to determine whom rich states have a duty to accept as denizens, and what real world parameters we ought to start from in questioning when the existence of denizens constitutes a problem. In Chapter 2, I contend that there is neither a good case for open borders nor a good case for closed borders, and that under these conditions the existing institutional structure of bordered states gains some legitimacy by virtue of the fact that it is in existence. My main reason for the rejection of the case for open borders is that I consider it to rest on an argument for global distributive justice, and the aim of global justice is clearly better served by global redistribution rather than open borders. I further argue that the polarised nature of the open borders debate is often counter-productive as it leads to the fairly glib conclusion that borders ought to be ‘more open’, without specifying to whom borders ought to be open to. I argue that we ought to adopt a policy of *selectively* open borders, and I outline the sorts of entry claims that are most compelling. Borders should be selectively open to certain sorts of claims, including claims of *membership* (from refugees or stateless persons), and claims of *reparation* (individuals who have been adversely affected by the historical decisions or policies of the would-be state of migration).

I then turn to existing attempts to theorise denizenship. Chapter 3 examines one possible answer to the question of when denizenship is problematic, namely that it is problematic if it is a status of rights vulnerability. The rights of denizens have attracted scrutiny as a philosophical question of human rights provision, as a legal question of constitutional rights (particularly in the United States) and as a political question of access to public services. The dominant narrative has emphasised the *similarities* between denizenship and citizenship and celebrated the fact that citizenship is no longer a precondition for legal rights in liberal democracies. In Chapter 3 I challenge the view that rights alone can tell us the conditions under which denizenship is problematic. I make the argument in three steps. First, analysis of rights alone pays insufficient attention to the way in which the situation and status of migrants prevents them from exercising certain rights in practice. Second even if we assume perfect enjoyment of rights, and that denizens are permanent (so we examine the ideal-type of the permanent full rights-holding denizens) the absence of political rights is more problematic than liberal rights theory allows. Specifically, liberal political theory lacks an account of how non-citizens are rendered vulnerable because

governments are not forced to be responsive to their interests, an argument made by democratic republicans. Third, the claim that rights vulnerability is necessarily problematic is too strong as it suggests that even the absence of full citizenship rights of *transients* is of concern, and that the correct response to denizenship is *always* to increase the rights of denizens (even for temporary workers). By identifying the problem of denizenship with the absence of rights, the rights approach debars itself from making the argument that lacking certain rights is wrong in some circumstances faced by denizens but not others.

Chapter 4 seeks to provide an answer to when the rights vulnerability of denizenship becomes problematic, specifically when access to citizenship is restricted. It evaluates three accounts of citizenship acquisition on the basis of the response they give to denizenship. The first account, provided by Benhabib, contends that denizenship is problematic if it is permanent. The second response, given by Miller, argues that denizenship is problematic if exit from it is unfair. The third response, derived from Carens' theory, maintains that denizenship is problematic if exit from it is not automatic after a certain period of time. I contend that our intuitions about the problem of denizenship are not only the result of how easy or difficult it is for denizens to become citizens, but also of how easy or difficult it is for them to leave the country. I identify limitations with all three theories on the basis that they pay insufficient regard to these two ways to leave the status of denizenship. I argue that the first two theories do not consider how citizenship requirements can have a differential impact on different groups of migrants. The third approach on the other hand does not consider how factors other than length of residence can contribute to the exit costs of leaving the state – an intuition I go on to develop in Part 2.

The second part of my thesis contains the positive case for understanding denizenship through the lens of domination. It begins with Chapter 5 which examines the theory of freedom as non-domination independently from the case study of denizens, so that the definition of domination I adopt is not tailored to fit denizens. I evaluate three main theories of domination, suggest some potential modifications to them, and set out my refined conception of domination. In the first section of the chapter, I present some preliminary reasons why domination may be a rich idea to mine for a new theoretical approach to denizens. Then I set aside the case study of denizens in order to analyse the theory of domination. To begin with I examine the theory of domination as 'inhibited participation', concentrating on the writings of Bohman. Then I explicate and build on the 'subjection to capacity of arbitrary interference' theory of Pettit. In the fourth section I evaluate Lovett's contribution to domination theory; 'dependence on arbitrary power'. Finally, I set out my own concept of domination as 'dependence on unaccountable power'. I argue for a modification of the concept of arbitrariness which distinguishes between its use as a substantive, evaluative standard, and as a procedural measure of checks, and propose the use of the term

‘accountability’ for the latter application. I also suggest that we can only ever speak of ‘*vulnerability* to domination’ due to the epistemic obstacles to determining the exercise costs of interference of potential dominators and the exit costs of potential dominatees.

In Chapter 6 I apply this conception of domination to the case study of resident non-citizens. In the first part of this chapter, I examine the measurement of domination, and the role of empirical evidence in determining its existence. In the second, I aim to establish whether resident non-citizens are vulnerable as a group, and factors that influence the vulnerability of resident non-citizens to domination. I identify a set of ‘vulnerability indicators’, including immigration status; state and citizenship of origin; length of residence; financial status; and language, skills and education. In the third part of the chapter, I examine the cases of four particularly vulnerable groups: domestic care workers, undocumented migrants, refugees and asylum seekers, and women dependent on the immigration status of their partners. For each, I examine evidence of the direct and indirect effects of domination and find that there is widespread evidence of the vulnerability of these groups to abuse and exploitation, and of the indirect effects of domination such as uncertainty, loss of self-respect and strategic anticipation.

In the final chapter, I aim to persuade the reader that the domination of denizens should be reduced, and to set out some suggestions for how this could be accomplished. In the first section I present an argument for why we should value and promote non-domination. In the second section I construct a case for according equal weight to the non-domination of non-citizens and citizens. In the third part of the chapter, I outline the policy approach that the goal of non-domination could inform, and I identify different categories of policies that could be adopted: improving the accountability of states to their non-citizen population, empowering denizens in their private relationships, reducing domination in immigration policy and reducing arbitrariness in citizenship acquisition. Finally, I evaluate the contribution of the thesis as a whole in a concluding section. Notwithstanding some noteworthy objections, I hope to have provided a novel approach to immigration theory of interest to philosophers and policy-makers alike, and to have cast new light on the rich potential of republican theory.

Part 1: Existing Approaches to Denizanship

Chapter 2 – Selectively Open Borders: An Ethical Border Policy⁵

Suggest to a policy-maker in Britain, or indeed in *any* liberal democracy, that we should open up our borders and allow anyone who wishes to move here and they would probably laugh. An open border policy is far removed from policies under consideration anywhere, and it jars with fierce and widely held beliefs about the right of states to determine their membership, and even deeper worries about population flooding, national security and the collapse of public services. However, the philosophical case for open borders is compelling. On what possible grounds could the fortunate citizens of rich states deny to much less well off migrants the opportunity to seek a better life for themselves? Small sacrifices in our quality or “way of life” would be far outweighed by the vast gains for migrants who would otherwise have a meagre shot at a decent life. Moreover, coercively preventing the flow of people in order to keep the resources of a state for the citizens who live there seems to make where you are born – a matter of brute luck rather than merit or desert - into ‘the modern equivalent to feudal privilege – an inherited status that greatly enhances one’s life chances’ (Carens 1987: 252). Attempts to justify border control have therefore generally accounted for the value of closure from the perspective of the citizens of states; as soon as would-be migrants are included as moral addressees in this question it becomes significantly harder to justify exclusion. There is a near-consensus that borders should be at least much, much more open. How can we square accepted policy doctrine with the far-flung conclusions of philosophers?

This review chapter offers some tentative suggestions for navigating the “theory/practice gap”: the distance between what seems mandated by the principle that every human life is deserving of equal concern and respect, and the starting point and *realpolitik* of a world system of sovereign states. My contention, like many other immigration scholars, is that both arguments for closed and open borders have significant limitations, but that given present levels of global inequality the case for closed borders is fatally weakened. Where I depart from the common consensus is what I think philosophers should say about this. Many commentators have identified these two tensions in immigration theory: that arguments on both sides are imperfect, and that the open borders debate is out of touch with everyday thinking. But a surprisingly high number have concluded that this means we should meet in the middle and contend that borders should be ‘fairly’ or ‘more’ open. My argument is that this short-changes the principles behind each way of thinking. Instead, we should bring the most successful arguments for both open and closed borders to bear on the question of *how* borders should be more

⁵ In the policy debate, ‘selectively open borders’ refers to an immigration policy which selects only migrants who will be of economic benefit to the state, usually because they have skills that are in demand. I appropriate it here to make the point that ‘selection’ should be on the basis of need, not merit. My title also alludes to Veit Bader’s (1997) plea for ‘fairly open borders’, in his chapter of the same name. My argument in this chapter is that qualifying the ideal of open borders with the adverb ‘fairly’ is unhelpful - we need an account of what claims borders should be open to. Hence ‘selectively open borders’.

open – in other words, what these arguments prescribe in terms of an ethical border policy. The question of *whether* liberal societies may restrict immigration, the one most theorists ask, is often wrongly taken to preclude the question of how states can restrict immigration given that some degree of closure is an inevitability. This legitimates the rather banal, and as I will argue, morally problematic, conclusion that borders should simply be more open.

This chapter seeks to open this approach to the debate rather than stipulate firm principles that should govern it. My main argument is negative: that we should not merely advocate ‘more open’ borders. But I do make a tentative, positive argument: that borders should be ‘selectively open’ to particular sorts of claims, including claims to membership and claims for reparation. I make this argument in three steps. First, states have a presumptive right to control borders but not the right to set whatever border policy they wish. Second, all individuals have the right to a decent life, but they do not have the right to the *means* to this life, therefore they do not have the right to migrate to a particular state. Moreover, only a very small proportion of the global poor can be helped through migration, and because these duties are to all, not just to would-be migrants, global aid is a more legitimate policy for tackling global poverty. The third step to my argument sets out three exceptions to this general principle, the claims to which borders should be ‘selectively open’. First, individuals from states who have a claim on a particular state due to historical injustice, conflict, exploitation and oppression have a strong entry claim. Second, individuals who could not be helped in their home environment and therefore have a claim to membership have strong entry claims generating duties that should be shared amongst rich states. Third, because states do not have the right to set whatever border policy they wish, they should be wary of policies which perpetuate brain drain and prioritise less well off migrants. The chapter concludes with identifying future research questions, including on the status of irregular migrants.

I: Arguments for Closed Borders

Immigration theorists regularly remark on the gulf between the political dogma of territorial border sovereignty in modern states and the considerable agreement amongst philosophers that the right of states to control their borders is indefensible on normative terms (Kukathas 2005, e.g. Cole 2000). Within liberal theory there is a similar gap, between a commonplace style of reasoning that is statist in focus, and its lack of fit with fundamental principles that are universalist in commitment. Many political theorists assume, rather than justify, the right of states to control their borders and thus to give the interests of citizens priority. The paradigm example here is John Rawls (1999: 38-9), who confines his discussion of border policy to a footnote – a telling illustration of the classic liberal approach to immigration. Societies are closed, and citizenship is a ‘relation of citizens within the basic structure of society, a structure we enter only by birth and exit only by death’ (Rawls 1993: xlv).

Political philosophers have historically been relatively silent about the way in which immigration

disrupts the idealised nation-state, preferring instead to assume that every resident of a state is also a citizen.⁶ Thus immigration is treated as fundamentally anomalous. One explanation why immigration is undertheorised is the significant challenge it sets to customary modes of political philosophy. 'Immigration is not simply one more issue to which the machinery of liberal political philosophy might be applied: by its very nature, it forces the revision of some of the assumptions traditionally made by liberal theorists. As such, it is surprisingly difficult simply to figure out how to discuss the ethics of immigration, let alone to develop an adequate theory by which those ethics might be understood' (Blake 2003: 224).

These idealised assumptions lead to an oft-noted paradox: most liberal thinkers have considered liberal institutions to be predominantly bound up with the nation-state, but the same liberal principles applied to all humans seem to stipulate open borders. In this vein Phillip Cole (2000: 2) argues that political theory has a 'blind spot' in relation to the theory of immigration as it takes it 'as given that people are citizens of the community in question, and all questions of justice are to be addressed and resolved amongst equal citizens'. Similarly, Melissa Lane (2006: 131) maintains that '[g]lobal migration is not an optional, adventitious or minor process which may be conveniently ignored in thinking about politics, in the way that John Rawls abstracted from it in assuming that one could make a reasonable (if simplified) model of political society as a closed community entered only by birth and exited only by death'. For Cole, acknowledging this tension between liberal principles and a statist focus puts the liberal theorist on the horns of a dilemma; either accept that open borders are logically entailed by commitment to liberal principles, which is likely to entail difficulties in justifying how state-based liberal principles can be preserved, or assume the primacy of such state-based institutions and attempt to demonstrate why liberal principles are delimited, or why borders are normatively significant.

The right to control borders is therefore often assumed rather than spelled out. As Blake (2003: 226) puts it 'explicit defences of that right are comparatively rare, a fact which is explained in part by the seemingly obvious nature of the right in question'. Nevertheless, the last two decades has seen the importance of closure more comprehensively evaluated. Justifications for arguments for state control of borders have come from four different sources: communitarian or liberal nationalist concerns about cultural continuity; practical considerations including population saturation, national security or civil unrest; protection of liberal institutions like the welfare state or representative democracy; and the right of states to self-determination or freedom of association. In practice, most theorists endorse and interweave a mixture of two or more of the above rather than defending them in isolation. For

⁶ Notable early exceptions to this include Henry Sidgwick's (1897: 248) *Elements of Politics* which argued that 'a State must obviously have the right to admit aliens on its own terms, imposing any conditions on entrance or tolls on transit, and subjecting them to any legal restrictions or disabilities that it may deem expedient'.

example, Michael Walzer's (1983) now-classic defence of closure connects self-determination to distributive justice, democratic association, and cultural continuity. Similarly, David Miller (2002, 2000, 2005, 2008a) emphasises the need for states to protect their political culture and therefore borders, but also provides arguments from population control and social trust and welfare.

Prudential arguments pertaining to public security, overpopulation, pressure on welfare services, reduction in social cohesion and the distortion of the employment market resonate most closely with political and media discourse. The clearest example of a philosophical defence of these concerns is Miller's (2005: 201) claim that countries have 'little or no incentive to adopt [population control] policies if they can "export" their surplus population through international migration, and since the policies in question are usually unpopular, they have a positive incentive not to pursue them'. Along similar lines, although reinforced by a more comprehensive moral theory, communitarian and nationalist arguments emphasise the importance of culture for the individuals living in a state. They contend that cultural continuity is jeopardised by particularly high levels of immigration or by compromising the right of current members to choose who will join them. This view is most often associated with Walzer's (1983) claim that border control is necessary to maintain 'communities of character', but also with later communitarian arguments like that of Peter Meilaender (2001) and those of liberal nationalists like Miller and Yael Tamir (1993). The different versions emphasise different aspects of culture and for different reasons. One dividing line is between the role of culture in constituting the collective identity of members, and the *political* culture or the instrumental role of culture in facilitating liberal institutions.

Taken alone, the cultural argument sounds weak. The implication that the dominant majority culture is superior and the myth of cultural homogeneity and revisionist history is of course unattractive insofar as it obscures the history of conflict and repression of national minorities and aboriginals (e.g. Bader 1995). The claim that culture should be preserved also struggles to hold up under scrutiny - national cultures change over time and are not 'like paintings to be framed and preserved', and they may be in fact be improved by the immigration process (Seglow 2005: 322). Miller (2005: 200 his emphasis) acknowledges that this argument can at most support restraining but not halting immigration: states 'might have reason to limit the *flow* of immigrants, on the grounds that the process of acculturation ... may break down if too many come in too quickly'. Alternatively, culture might be instrumentally valuable if liberal institutions depend on cultural continuity. Miller's second argument from culture takes this approach, he argues that states require a 'common political culture' to undergird democracy and other social goods. Language and cultural heritage are therefore legitimate goods for states to protect. But the suggestion that the presence of immigrants will jeopardise political culture is also deeply controversial. It is by no means clear that immigrants will be illiberal - empirically speaking, they are more likely to be committed to liberal institutions than those who do

not migrate as they have chosen to migrate, after all (Bader 1997). Restricting access to such institutions on the basis of the fact that they *may* not be sufficiently supportive of them places the presumption of guilt on them.

More compelling is the claim that mass immigration would jeopardise and eventually corrode the social trust that underpins democratic institutions and social welfare policies. Either citizens would renege on their obligations to pay into taxation and national insurance schemes or tax avoid, would move to a country where tax obligations were less onerous, or would vote for political parties who advocated a thinner welfare state. In sum, '[s]ocial justice will always be easier to achieve in states with strong national identities and without internal communal divisions' (Miller 2000: 96). This argument has two main problems. The first is that it is to a considerable extent contingent on empirical verification, and the evidence has been scant (Banting and Kymlicka 2006). The debate is also inextricably bound up with the question of what socioeconomic rights immigrants are granted and whether there is a "cooling off" period when they first arrive before they can make claims on welfare systems. Ryan Pevnick (2009) holds that because opening borders does not necessarily warrant extending welfare benefits to migrants, at most the social welfare claim is an argument against granting migrants welfare rights, not against admitting them at all.

All prudential and cultural arguments encounter fundamental difficulties when they are weighed against claims to admission. Moving to a new state, for many migrants, is a precondition for having any kind of decent life at all. In contrast, arguments from culture or robustness of the welfare state seem thin and protectionist. On the other hand, if these arguments only ground a *prima facie* right to exclude which can be overridden in certain circumstances, then we need to set out what these are. Some defenders of the primacy of culture have taken this sort of line. While he thinks culture justifies border restrictions in principle, Will Kymlicka (1995: 224 n. 18) contends that a country 'forfeits its right to restrict immigration if it has failed to live up to its obligations to share its wealth with the poorer countries of the world'. Similarly, for Tamir (1993: 161), '[l]iberal nationalism thus implies that it is justified for a nation to seek homogeneity by restricting immigration only if it has fulfilled its global obligation to assure equality among all nations'. However, these concessions might be self-defeating: they imply that the presumptive right to border control would be routinely overridden to the extent that the argument from culture has no purchase in practice (Blake 2003: 234). These sorts of claims fall short of the mark if they merely demonstrate the *interests* of citizens in closure, likely to be overridden by the more fundamental interests of migrants in moving here. Alternatively, if we accept that they do ground a *right* to closure, we are granting that the interests of citizens in the above reasons for closure are more important than those of non-citizens. But this sort of 'trump' is surely too strong: it precludes us indicating *any* conditions under which the right may be overridden (Bader 1995). Whatever the value to these arguments, they are all conjectural taken alone as they beg the

question as to why the interests of citizens in the values listed above should outweigh the, often more fundamental, and certainly more numerous, interests of non-citizens in migrating. Hence they all require additional arguments to show why it is legitimate for, and not just in the interests of, states to control borders. In other words, they are contingent on a convincing case for the right of states to put the interests of their citizens first in migration policy.

One candidate for this is the right to freedom of association. A particularly strong statement of such a right has recently been provided by Christopher Heath Wellman (2008). Wellman also offers a credible response to the problem outlined above: it is wrongheaded to be weighing up the interests of citizens and would-be migrants at all because it rests on an implausible account of equality. I will deal with each of these in turn. The argument from freedom of association asserts that a state has the moral right to control its borders grounded in the right to freedom of association of its citizens. Extrapolating from the central intuitions that we hold about the fundamental importance of freedom of association, Wellman argues that citizens' right to freedom of association permits them to choose whom they accept into their midst. Central to freedom of association, for Wellman, is the freedom *not* to associate, which he illustrates through the connection between marriage: the right to marry any willing partner also requires the right to stay single, should one choose to do so. Wellman contends that the intuitions we hold about this fundamental freedom not to associate at the individual level are replicated at more general levels such as in relation to religious and social groups, and, crucially, states. '[J]ust as an individual has a right to determine whom (if anyone) he or she would like to marry, a group of fellow-citizens has a right to determine whom (if anyone) it would like to invite into its political community' (110-11).

There are several significant problems with the move from freedom of association to the justification of border controls. Seglow (2005) raises the point that unlike clubs, the state is a body which administers vital goods. Sarah Fine (2010) points that in any case even clubs are bound by external constraints; members are free to associate to the extent that they do not harm others. Because of the sort of goods associated with membership of a state and the basic interests involved in migrating from one state to another, denying entry is a potential source of harm. And harm is the sort of thing that justifies a constraint on freedom of association, precisely because it is harm to internal members that overrides the collective self-determination of the group.

Thus freedom of association might, unlike the other arguments I have examined, provide a clearer account of under what conditions a state's right to control its borders is overruled: when it restricts people's access to basic goods, as Seglow argues, or when it causes harm, as Fine contends. But Wellman rejects the view that states ought to be constrained in any way in setting a border policy – not by the claims of destitute migrants, nor those of political refugees. States cannot even be

compelled to adopt non-racist admissions policies. Wellman repudiates the egalitarian argument because he thinks that states' duties of global aid can be fulfilled more directly than through opening their borders. More controversially, as even political refugees might be better helped 'at home', than by extending membership, this leads him to the conclusion that: 'every legitimate state has the right to close its doors to all potential immigrants, even refugees desperately seeking asylum from incompetent or corrupt political refugees that are either unable or unwilling to protect their citizens' basic moral rights' (109). And Wellman even goes one step further in rejecting the argument made by Miller that potential immigrants cannot be discriminated against on the basis of race, because he doubts that states can be bound by such considerations: in the same way as racist individuals cannot be forced to marry outside their race. Instead, he constructs an argument against these sorts of policies from the interests of current citizens.

I think that Wellman goes wrong in two, related ways. First, that the egalitarian argument does not overturn a presumptive right to states to control their borders does not mean that it has *no weight at all* in immigration policy. This does not, for example, consider the quite compelling argument that to the extent to which states fail to discharge their global duties, they have a responsibility to accept people affected by global poverty as immigrants (see Section II for a discussion of this argument). Second, there might be more of a connection between the global poverty argument and border control than Wellman concedes. For example, if by virtue of its border policy a state contributed to a situation of global poverty, say by only accepting highly skilled medical workers, then the argument that global justice duties and migration duties are of a fundamentally different character seems unconvincing. Wellman might wish to say that a state has certain general duties of global justice, and other duties of global justice that derive from the role the state played in provoking a certain state of affairs as well. Thus an unfair immigration policy that contributed to global poverty or brain drain would generate additional global justice duties. But this does not seem right. The duty to not knowingly cause poverty through adopting a certain kind of immigration policy must be more direct than this.⁷

In sum, it seems that arguments for a state's right to control its borders are problematised by the fact that if they work, they are too strong. Arguments from culture, prudence, or protection of liberal institutions only succeed if we already accept that the interests of citizens should be prioritised over the interests of non-citizens. Even if we accept that a state has the right to prioritise the interests of its citizens in immigration policy, we are left with the outstanding problem of when if ever this should be

⁷ However, against this Wellman might say that the duty generated by the unfair immigration policy would still be one of financial resources, not a duty to accept additional migrants. The point would still therefore stand that global duties and immigration duties are of a fundamentally different character. I think this is right: duties of immigration should actually be duties of immigration, not secondary, indirect duties generated by the nonfulfilment of other primary duties (I will say more about this in Part III). Nonetheless, I think this gives us reason to doubt the argument that a state's right to close its borders means a state has the right to *set any border policy it wishes*.

overruled. Thus we have established that the arguments for closed borders lack legitimacy if they make no room for when the right of states might be overridden. But none of the advocates of closed borders considered here effectively set out the conditions under which such a right might be overridden. The three candidates considered here: when closure causes poverty, when closure restricts access to basic goods, and when closure causes harm seem likely to lead to much more open borders. But they might all be superfluous if there are strong independent arguments for open borders. These will be considered next. I hope to have shown that, pace Wellman, a state's right to set border policy can at best only be presumptive, and that global justice considerations play a part.

In the next two sections, I will consider further the relationship between global justice and constraints on immigration policy, by turning to arguments from *open borders*. First I will assess whether there is a presumptive right to free movement, which would suggest that the onus is rather on those who would justify closure to identify the conditions under which the presumptive right should be overridden. I will then turn to the argument from global justice to see what this tells us about border policy.

II: Arguments for Open Borders

Arguments in favour of open borders generally fall into two camps. The first contends that there is a right to free movement. The second argues that moral egalitarianism requires that people are not disadvantaged by an arbitrary fact of birth and therefore ought to be able to migrate to escape their disadvantageous circumstances.

A Right to Freedom of Movement?

A fundamental and simple challenge to the right of states to control their borders is the claim that it is incompatible with the moral right of free movement for individuals. Is there such a right? It is evidently something we have a strong intuition towards favouring. As Carens (1992) observes, borders prevent people from moving in and out of certain territories, the kind of physical closure associated with imprisonment; they are backed by the threat of coercive sanctions; and they restrict access to jobs, experiences and people. Furthermore there is something fundamental about movement in that it facilitates all other basic activities. The freedom to seek employment opportunities, pursue lifestyle choices, have relationships with other people, and control the development of one's own life all require the freedom to move around. Freedom of movement also has a strong precedent in human rights law, where the UNDHR states that 'Everyone has the right to leave any country including his own' and the Fourth Protocol of the European Convention states that 'No-one shall be arbitrarily deprived of the right to enter his own country'. Freedom of movement in various forms is therefore of considerable value to liberal theorists, therefore a moral right to transnational movement seems, *prima facie*, plausible.

Several theorists have developed this intuition and argued that there is at least a presumptive right to

free movement. Carens (1999: 1083) contends that the ‘important human right’ of free movement should be a presumption barring insurmountable threats of national security or public order. Similarly, Michael Dummett (2001) argues that individual freedom demands transborder freedom of movement, unless there is a serious threat of overpopulation or cultural submergence. Phillip Cole (2000) and Jean Hampton (1995) both make the case for freedom of movement to be considered as a basic liberty, with Hampton adding that unless it can be shown that an unlimited right of migration would jeopardise the value of freedom of choice it should be preserved alongside other core freedoms liberals hold dear such as freedom of religion.

Although freedom of movement is intuitively compelling, there are three considerations which need to be addressed. The first is whether the rationale behind freedom of movement within a state also applies to freedom of movement across borders. Assuming the justification is sound, the second question is what form freedom of movement should take. This includes determining whether free movement is a right or liberty or privilege, whether there is a general right to freedom of movement or a right to particular movements, who the duty-bearer/s for this right are, and what the duties are, which depends on whether the right requires that duty-bearers abstain from certain actions (negative rights) or whether they can be called upon to perform certain actions (positive rights). The third question concerns the way in which the right to free movement could be realised, as considerations need to be paid to the way in which this right is balanced against other rights, and how it should be respected if, for example, only a subset of people can ever have this right fulfilled.

The case for free movement across borders can be made on the basis of two core intuitions about the injustice of restricting free movement. The first is that we value freedom of movement within a state and would consider it oppressive for officials, agencies and obstacles to be mobilised to restrict people moving around. This argument from consistency between internal and transnational freedom of movement is summed up by Carens (1992: 28) as follows: ‘The radical disjuncture that treats freedom of movement within the state as a moral imperative and freedom of movement across state borders as merely a matter of political discretion makes no sense from a perspective that takes seriously the freedom and equality of all individuals’. The second point, also emphasised by Carens, is that we consider it wrong for a state to prevent its citizens from leaving, and consider such policies to epitomise oppressive totalitarian regimes. We place a great deal of importance on the right of individuals to leave their states and indeed we would doubt the legitimacy of a state which restricted this. A right to leave would be meaningless if there was no corresponding duty to accept these individuals, so freedom of exit seems to entail freedom of entry.

The soundness of both of these moves has been questioned. Miller (2005: 195) points out that freedom of movement within states is routinely restricted by everything from traffic law to private

property. The problem might therefore be more accurately identified as the *arbitrary* restriction of free movement, by which I mean restriction without good cause and in a way which is unaccountable. Arbitrary imprisonment without trial seems wrong, but imprisonment of those convicted of serious crimes does not. Similarly, preventing all residents of Birmingham from leaving the city due to a bioterrorism epidemic of anthrax is significantly less concerning than preventing them leaving the city ever, or preventing the ethnic minority population alone. This puts the onus back onto those who would argue for cross border free movement, requiring them to show why borders are arbitrary restrictions. Indeed, Miller (2007) qualifies his argument for the right of states to control their borders with the claim that the use of borders to keep out immigrants of a certain national, cultural or ethnic origin would be arbitrary and thus impermissible.

The second dimension to the consistency argument, that the right of exit implies a right of entrance, also raises problems. One objection uses the analogy with marriage. The right to marry, say Barry (1992) and Miller (2005), is a *general* right rather than the right to marry a specific person, and is conditional on finding someone who will agree. Analogously, the right to free movement is dependent on finding a state willing to accept you. For Barry, '[i]t is a general characteristic of associations that people are free to leave them but not free to join them' (284).

However, Cole (2000: 56) counters that even if there is only a negative right not to leave a state, if you lack the right to enter any other state then you effectively lack the right to leave the state. 'The right to leave the state, even in its most negative form, therefore *requires* the right to enter another state – the right to *cross* the border.' In a similar vein, Ann Dummett (1992: 173) argues that '[l]ogically, it is an absurdity to assert a right to emigration without a complementary right of immigration unless there exist in fact... a number of states which permit free entry'. However, this seems to conflate a right to free movement, and a right to immigration. A right to marry merely requires the right to court a partner for marriage. Applied to states this suggests a right to *pursue* an alternative state. This implies the right to leave one's state in order to 'apply' for membership of a state elsewhere, and, as Cole points out, this requires the right to enter at least one other state. What Cole misses is that a right of entrance need not entail a right of immigration. We can see this with the principle of asylum; refugees apply once they have escaped their country and have found their way to another country, but although they need either official or unofficial right of passage to the state of asylum they need not have been granted asylum in advance. This prompts consideration of the second set of potential problems in relation to the right to free movement; the sort of right it is.

Advocates of free movement emphasise the illegitimacy of borders, so suggest that free movement should place duties on states not to prevent people from entering. In Hohfeld's (1964) theory of dyadic rights, this suggests that free movement is a liberty and that states have 'no-right' to control

their borders, erect physical barriers, prevent people from entering, or deport migrants. But if freedom of movement is simply a liberty, then it is a rather hollow liberty for most of the world's poor. It is costly to travel and to emigrate, hence it would be a liberty that only the privileged could claim. Simply removing formal barriers – borders – would therefore not enable migration for many of the world's poor.

However, the duty to accept migrants might place additional demands on states than merely opening borders if we accept that immigration involves a claim to membership (Coleman and Harding 1995). Several scholars have argued that is misleading to suggest that all it at stake in free movement is the actual transit across borders. Seglow (2006: 3) observes that 'migration involves participating in the institutional complex of a new society, something additional to free movement'. Miller (2008a) extrapolates from these observations to argue that the demands placed on the state in relation to their non-citizen population themselves mandate and justify closure. While prior to the twentieth century, immigrants were granted little in the way of rights, the modern commitment to 'the idea of equal citizenship' means that 'every adult member of the political community must enjoy equal rights and responsibilities which together make up the single status of citizen' (375). Moreover, this is a 'one-class status... no one can legitimately be a second-class citizen'. This necessitates multifarious measures of equality of opportunity, but also, for Miller requires efforts to encourage strong citizenship or 'efforts to get people to take their political responsibilities seriously'. There are others who argue that we should respond to this trade-off in the opposite way, by advocating admitting many more immigrants but restricting their access to social welfare systems (Pevnick 2007, Bell 2006). Conceiving of immigration as 'free movement' alone over-simplifies the issues at stake and fails to adequately engage with this trade-off.

These problems in realising the form of the right to free movement are symptomatic of a broader problem with conceptualising such a general right. This is that human rights are held equally by all by virtue of being human, but that the strength of the justification for such a right varies dramatically according to which individual's claim we assess. A human right to free movement would make discriminating between migrants illegitimate, whether on the basis of potential contribution (as in current practice), or need (as many theorists argue that justice requires). It is telling that one of the main arguments in favour of free movement derives from the analogous injustice of restricting freedom of exit. This suggests that the main source of our intuition that the right to free movement is important is because of the injustice of restricting individuals from fleeing oppressive regimes, or pursuing better life chances if they are desperately poor. However, the vital interest involved in justifying the right is not the interest an individual has in moving or emigrating per se, but in removing herself from oppressive or destitute circumstances. A more plausible reconstruction of the right to free movement is therefore that the moral claim involved is then not for a right to free

movement but the right to specific forms of movement – to escape destitution and oppression. This cannot be a general, human right, but must be specific to certain individuals.

A similar argument is made by Miller (2005) who claims that individuals need only ‘sufficient’ freedom of movement, which is generally provided *within* states. If, on the other hand, the argument is that freedom of movement is lacking for certain individuals, we need to ask why we think this is the case – because the individual’s basic interests are not met so she needs to move in order to have a better chance at their fulfilment. In this case, there is clearly something more than just freedom of movement for its own sake at stake. Vital interests would only require transnational freedom of movement if only by moving to another country could someone find work, obtain medical care or escape persecution. But ‘[i]n these circumstances the person concerned may have the right to move, not to any state that she chooses, but to *some* state where these interests can be protected’ (195). Thus for Miller these conditions generate a remedial right, rather than a basic human right. As soon as we look for a more general rationale – then an adequate range of options becomes enough to fulfil the basic interest.

It follows that the moral force of poverty and oppression underpins the most plausible version of the right to free movement. I will therefore turn to the broader argument for open borders from global poverty in the next sub-section. This argument presents open borders as an issue of distributive justice quite independent of any right to freedom of movement.

The Case from Global Justice

The clearest statement of the moral egalitarian case for open borders is provided in one of the earliest statements of it: Carens’ (1987) ‘Aliens and Citizens: The Case for Open Borders’. Carens examines three influential approaches to political theory – Rawlsian liberalism, libertarianism and utilitarianism – to demonstrate that each, properly construed, would support open borders. I will focus here on Carens’ writings about migration and the ‘original position’, and the moral egalitarian approach to migration that it influenced. Carens considers the implications of Rawls’s ‘original position’ for immigration – the thought experiment in which we consider what principles of justice would be most attractive if the reasoners knew nothing of the package of natural and social contingencies they would enjoy in the real world. He contends that an individual’s place of birth is exactly the sort of morally arbitrary fact that would be hidden behind the ‘veil of ignorance’. Parties in the original position would suspect that at some point in history the various countries would be unequally endowed with resources, including political liberties. They would therefore protect the right to free movement, because migration might be crucial to alleviate some of the disadvantages of birth. Similar thought experiments such as Dworkin’s idea of an ambition-sensitive and endowment-sensitive auction similarly demonstrate the brute luck character of citizenship (Bader 1995).

The principle of ‘morally arbitrary factors’ is intended to differentiate between factors individuals should and should not be held responsible for. Otherwise known as ascriptive characteristics, the principle is that people’s life chances and inequalities should result only from personal choice. However, the connection between moral egalitarianism and open borders actually has two different forms, which are distinguished from one another in recent work by Carens (2010). First, equality of opportunity requires that individuals can move across borders to seek alternative life chances because the opportunities available in different countries vary so much. Second, open borders would reduce global political, social and economic disparities as many more individuals would move to a state with a higher standard of living. The two arguments will be considered in turn.

The first thing to observe is that moral arbitrariness of citizenship is not exactly like the moral arbitrariness of sex or ethnic origin. The egalitarian principle of differentiating only on grounds on moral relevance is an anti-discriminatory principle. In a system of sovereign states however, formal citizenship functions as what Rogers Brubaker (1992: 31) calls the ‘filing system’ of international law: crudely, it denotes who has responsibility for an individual. Such a system has been defended by Robert Goodin’s (1988) consequentialist justification for the division of the world into states: it is efficient to divide up responsibility for fulfilling individuals’ basic rights in the same way as it is efficient for doctors in hospitals to divide labour and take responsibility for a certain subset of patients rather than all try to see all patients. This view has attracted substantial criticism as if relationships of responsibility were determined on the basis of their consequences alone it would make far more sense for rich states to have responsibility for the global poor, than for their own citizens (e.g. Miller 1988).

In fact, our special relationships reach beyond fellow compatriots as we are embedded in multiple interactions and relationships, what Veit Bader (2005) calls ‘embedded impartiality’. For Bader, we have ‘associative duties’, which can be defined as duties to ‘people with whom we have had certain significant sorts of interactions or to whom we stand in certain significant sorts of relations’ (Scheffler 2001: 49). But Bader argues that we also have multiple layers of different types of special obligations including contractual duties arising out of promises and agreements, reparative duties to those we have harmed, and duties of gratitude to those who have helped us. Bader must be right about this: Goodin’s approach is not only flawed on its own terms, but it is overly simplistic as he looks for a monistic source for special duties, and ignores counter examples which might disprove it. Goodin evaluates alternative approaches to special duties according to whether they could explain seven intuitive examples of compatriot priority. But for each one of these examples we could plausibly think of other examples where we also have special duties to non-citizens. In particular, Goodin cites several instances of where ‘aliens’ have been treated worse than citizens, and therefore rules out the

‘mutual-benefit society’ model because it generates a ‘mismatch’ which is ‘most glaring as regards resident aliens: they are often net contributors to the society, yet they are equally often denied its full benefits’ (676). Notwithstanding the striking point that states may simply be wrong in denying full benefits to resident non-citizens who have the moral right to them, we could alternatively conclude that there are multiple bases for special duties.

Applying Bader’s more nuanced model of special duties contributes an additional perspective to the immigration debate: it demonstrates that one of the reasons it makes no sense to say that a certain individual P has the right to migrate to a particular state A is that there is nothing tying the individual to the particular state. Consider the following argument that 1) P has the right to a decent life, and 2) P’s prospects of living a decent life are considerably diminished if she stays in her state of citizenship and considerably improved if she moves to a rich state, therefore 3) P has the right to move to a rich state. We still lack an account of why A should be the rich state. If all rich states share a responsibility for P’s welfare, then it makes no sense to say that P has a right to state A in particular. In fact, I am more inclined to think that P has the right to a decent life but not to the means by which this is provided, or to a particular duty-bearer.

An alternative critique of the moral arbitrariness of citizenship makes a similar point. This view points out that citizens stand in a unique responsibility to the state as they are subject to its political jurisdiction and the coercive power of the state. This is one of the main arguments employed by defenders of statist liberalism such as Thomas Nagel (2005) and Michael Blake (2001). Blake (2003: 227) examined what this argument for bounded distributive justice offers to the open borders question:

I believe it is possible for us to challenge the equation of citizenship and arbitrary factors such as race or ethnicity. We may grant, I think, that in each case the categories are arbitrary from the moral point of view. My race and my citizenship are both produced by circumstances for which I can take neither credit nor blame. But from the fact that the circumstances giving rise to a social or political difference are arbitrary, we cannot conclude that that difference is morally *irrelevant*. To see this, we may note that the border – however arbitrarily constructed – marks out something of great moral significance.

Like Goodin, Blake observes that governments can do things to their own citizens that they cannot do to non-citizens. Unlike Goodin however, Blake’s examples are not specific to *citizens*, but extend to all those subject to the jurisdiction of the state. Blake’s point is that states can tax, coerce and even execute their own citizens but that foreign citizens must ‘perform some special act to put themselves within the government’s sphere of influence’ (228). But this is not strictly true; although citizens are far more likely to be born in their state of citizenship than others, it is possible that people might grow up in a country other than their country of citizenship. If so, they have not ‘perform[ed] a special act’,

but they are still subject to the jurisdiction of the state.⁸ Citizenship might be useful to approximate morally relevant relationships of coercion, but it is not a necessary or sufficient condition for it.

Arash Abizadeh (2008) shows that in fact borders represent a significant type of coercion, and argues that the justification of state borders is therefore owed to all of those over whom powers are exercised. He holds that the principle of democratic justification is that ‘the coercive exercise of political power be democratically justified ... to all those subject to state coercion’, and argues that ‘all’ is a reference to all persons rather than all members (45). Therefore the justification for a particular border policy is owed to all of those subject to state coercion. Borders represent a particular problem for the indeterminacy of democratic legitimation because ‘borders are one of the most important ways that political power is coercively exercised over human beings’ in that they encompass ‘police dogs, electric wires ... helicopters... incarceration, deportation, shooting on sight, and so on’ (46). Therefore ‘the act of constituting civic borders is always an exercise over both insiders and outsiders that intrinsically, by the very act of constituting the border, disenfranchises the outsiders over whom power is exercised’. Border controls, like other coercive activities, ought to be subject to ‘participatory discursive practices of mutual justification on terms consistent with the freedom and equality of all’ (48).

Perhaps, therefore, Blake’s point is that subjection to political authority is what does the work: state jurisdiction matters because the exercise of power requires justification and accountability and states have a duty of care to all who are in their borders. After all, what happens to them is considerably within their sway in a way that it is not if they are under the jurisdiction of another sovereign state. But do we really want to describe tourists as being in the same position of coercion as citizens to the state they find themselves in for just a few weeks? I imagine that Blake would reject this, although it seems plausible that he might accept that after a few years of residence a non-citizen is relevant in this way. But again, we need a different principle to identify under what conditions someone is in a morally relevant relationship to the state other than stating that they are a citizen.

If, on the other hand, subjection alone grounds the moral relationship considered by Blake then this puts coercion theorists on the horns of a dilemma. If subjection alone constitutes the moral relationship then this implies that migrants who have been unable to migrate have a weak entry claim, but those who manage to enter *even if it is without the consent of the state* have a strong claim, or at least some claim to the rights that are granted as part of the package of coercion. Moreover, it leads to the rather counter-intuitive implication that a migrant would strengthen their claim to be admitted as a member of a state by getting into the state by whatever means, and take precedence over a potentially

⁸ The children of foreign citizens are a further problem here as they do not bear responsibility for their parents’ ‘special act’ of migrating or deciding to visit. I discuss children further in Chapter 7.

more needy migrant on the other side of the world. This implication is symptomatic of a deeper problem of circularity in Blake's account: the right to residence in the state derives from residence in the state.

Alternatively, if there is some other reason other than subjection that grounds these special rights then the coercion theorist would need to spell out this principle without reference to coercion or subjection alone. This puts the coercion theorist back at the point of trying to explain why citizenship is morally relevant, which of course what is so stringently rejected by moral egalitarians like Carens. My sense is that only an adapted principle of coercion can do what Blake wants it to do here. We need to know more about the conditions under which coercion becomes morally relevant. In the case of the tourist, the reason why coercion is not important might be that the tourist is only subject to coercion for a short period of time, or that the tourist has multiple alternatives. Conversely a citizen or long-term resident might effectively have no choice but to be subject to the coercive power of the state. Later in my thesis, I will argue that coercion is problematic in the way Blake envisages for an individual whose exit costs of leaving the state are significantly high.

A third critique of the moral arbitrariness of citizenship view observes the differential impact of relative equality within and between states. Wellman (2008) argues that the view that citizenship should not influence someone's ability to pursue life opportunities in other countries is a version of luck egalitarianism, and that we should rather be concerned with relational egalitarianism. The aim of equality is not 'exact equality of resources but sufficient equality to ensure that no one is able to use his greater wealth to gain political advantage over others in way that damages their partnership' as members of a society (121). As Elizabeth Anderson (1999: 314) maintains, we care about inequality because of its role in facilitating domination and oppression, so we should be 'concerned with the relationships within which the goods are distributed, not only the distribution of goods themselves'. The relative equality argument is a strong one when we consider that the negative effects of immigration in liberal states are often disproportionately felt by the worst-off citizens. Strains on public services, insufficient social housing as well as competition for low-skilled jobs fall on the worst-off members of society first (Macedo 2007). Moreover, richer citizens can, and tend to, move away from overcrowded urban areas (so-called "white flight"). But again, we need an account of who counts as a member in order that this principle of relational equality makes sense. One of the topics under consideration by immigration scholars is the status of irregular migrants, which they see as dependent on the answer to whether states have the right to control their borders (Risse 2008). If irregular migrants are members, their presence on state territory and the claims they make to relative equality are part of the justification for border controls, which seems like a contradictory conclusion to come to.

There are many outstanding issues which remain to be resolved. But on balance, I am unconvinced that citizenship is morally arbitrary in the same way as race or sex. If we assume the existence of the state system, then we need to accept the moral architecture associated with this including the differential impact of equality within and across borders, special rights and obligations, and coercion. I have suggested that presenting this debate as about *citizenship* might be misleading. In fact, what seems to be morally relevant whether we conceive this in terms of ‘coercion’ or ‘relative equality’ is being a *resident* of a political community. ‘Citizenship’ as it is used by Blake and Wellman is shorthand for residence, it does not signify a personal attribute of an individual but a particular type of power relationship between individual and state. It is subjection to state (under conditions yet to be spelled out) that seems to be morally relevant. This reinforces the ‘problem of denizenship’, as outlined in the last chapter, as a pressing one for immigration theorists to consider.

The second argument contends that inequalities between states are unjust, and argues that open borders would help even things out. First, the distribution of natural resources is (and was) imperfectly distributed across states, and borders were drawn by historical events, including war or force. The history of conquest, colonialism and imperialism vastly undermines the rhetoric of national responsibility for developing states which have only recently become independent. Moreover, global inequalities are perpetuated by actions of rich states and the global economic system. It is simply not the case that we live in a world of autarkic states; this is an anachronistic model in the modern global economy. World-market prices, the actions of multinationals, the policies of non-state international actors such as the International Monetary Fund and the World Bank contribute to a global system which perpetuates and fails to adequately challenge inequalities between states, or individuals (O'Neill 1994, Pogge 2002). The national policies of individual states have an impact beyond the confines of a bounded state, particularly environmental and business issues. Lowering corporate taxes or costs imposed on non-domiciles encourages businesses to set up in a particular country so it is a competitive action in a global economy. We have also begun to see the detrimental effects of developed states' high levels of production and consumption as the increase in global temperature has already contributed to droughts, flooding and natural disasters. The deleterious effects of climate change are likely to disproportionately affect the global poor, and they have been disproportionately caused by the global rich.

Against the backdrop of global injustice the function of borders in sustaining or perpetuating inequalities is what seems wrong, not the arbitrariness of where an individual was born. As Samuel Scheffler (2001) has argued, it is not special duties to compatriots that is wrong per se, but their function in maintaining the privileges of “in-groups”. Such privileges seem doubly unfair as participants benefit first from membership of the group and then receive additional advantages. In the case of states, ‘special duties provide a mandate for those who are already rich in resources to turn

their attention inward and ignore the poverty in the world' (94). The force of the global justice argument for open borders is that states have no-right, in Hohfeld's sense, to prioritise citizens by closing their borders to maintain inequalities. Closing borders in order to keep the resources of these states for the citizens leads us back to Carens' (1987: 252) point that citizenship is 'the modern equivalent to feudal privilege'.

These arguments are all powerful. Although a theory of global justice is beyond the scope of my thesis, my view is that states have considerable reparative duties to individuals in countries they exploited or colonised, and considerable reparative duties they share with other rich states to rectify the harms of the unjust economic system. However, if immigration is not a good way to alleviate global injustice then it is less evident that these obligations should or can be fulfilled through opening borders. I believe there are four main reasons why immigration is non-ideal. First, as Thomas Pogge (2002: 15) observes, it is rarely the worst-off who are able to migrate, because of the associated costs of migrating. Moreover, even the indirect impact of migration may be imperfectly targeted to the best off in disadvantaged states. Remissions sent by immigrants tend to go to the more privileged, and although some of these funds trickle down, in other cases these will 'be used to cement and entrench the oppression of the poorest by Third-World "elites"'. In any case, these funds are far more likely to increase than to reduce domestic inequality in the poor countries and therefore are a mixed blessing at best'.

Second, there are many personal costs in migration: such as leaving one's family and friend; gambling on finding employment opportunities; and leaving the political and social community where your interests are tied up. As Kymlicka (1995: 125) explains, 'people are members of societal cultures, [and] these cultures provide the context for individual choice... one of the functions of having separate states is to recognize the fact that people belong to separate cultures'. Third, individuals have an interest in living in communities where they are able to participate as full political members. This means having sufficient education about political institutions, being able to speak the official language, and being acknowledged as equal members of society by fellow citizens. Immigrants often struggle to attain these conditions in new states, even if access to citizenship is relatively undemanding. They may be treated as foreigners or second-class citizens, and they are unlikely to have the same opportunities to participate in the public sphere of their new states. For people to have to move in order to obtain the minimal resources necessary for a meaningful life is thus unduly burdensome. It would be more efficient, and more just, to redistributive global resources; to move the money to the people instead of the people to the money, to use Goodin's (1992: 8) terminology.

Finally, migration may even make it worse for those who do not migrate. Migration can lead to 'brain drain', where highly skilled workers are disproportionately the ones who leave a state, leaving the

worst-off even worse-off (Bader 1997, Pogge 1997, Miller 2005). The highly skilled may be important sources of institutional improvement and development, so encouraging their immigration may significantly reduce pressure on their home governments to reduce corruption and improve conditions. High rates of emigration also undermine developing countries' ability to recoup the cost of training highly skilled workers. The percentage of medical school graduates working abroad is the highest for sub-Saharan Africa, the Indian subcontinent and the Caribbean – regions with the worst health-care indicators. Three quarters of Ghana's medical school graduates, for example, leave the country within ten years of graduating (Kapur and McHale 2006).

Arguments from global poverty are therefore not straightforward positive arguments for opening borders; they are rather conditional, negative arguments against closing borders. As Bader (1997: 28) explains, '[a]rguments based on distributive justice... are indirect, instrumental, overtly conditional, more collective and they are silent in an ideally just world'. It would be more efficient, more beneficial to the worst-off, and more effective in reducing global inequality to transfer resources to poor states than allow a small proportion of their citizens to migrate. Goodin (1992: 8) maintains that, 'if arguments for international distributive justice are valid and if rich countries do not want to give generously of their money to meet the demands that those arguments impose, then they are morally obliged to pay instead in a currency that they hold even dearer... to admit substantial numbers of immigrants from the poorest countries'. This characterisation of immigration as a punishment designed to coerce rich societies into fulfilling their obligations for reducing global injustice is certainly not a great selling point for the open borders argument. The 'case for open borders' seems more like a bad case for closed borders, and as such it serves mainly to reiterate the failures of rich states to live up to their global duties.

In this section I have argued that there is no transnational right to freedom of movement, but a right to escape oppression. Second, that citizenship leads to different life chances is an inherent result of a world of sovereign states, and we have to begin from this starting point. Third, the moral force of global justice arguments derives from the large disparities between states and the fact that citizenship is used to justify maintaining privilege. If states lived up to their global obligations then the argument that citizenship is arbitrary would have little force. In sum, there is therefore no right on the part of individuals to migrate to a particular state. They have the right to a decent life, but no connection to a particular state as a means by which this should be realised. Moreover, only a small subset of people could ever exploit migration as the means by which to fulfil their right to a decent life. The global poverty argument is therefore inherently problematic. In the next and final section, I will draw some implications from these conclusions, and identify questions for future research, some of which will be examined in the remainder of my thesis.

III: Selectively Open Borders

If there is neither a good case for open borders, nor a good case for closed borders, what does this say about the border policy of liberal states? Many theorists have argued that it is at least clear that borders should be much more open, or that unrestricted immigration is an ideal we should aspire to (Kukathas 2005, Carens 1992, Goodin 1992, Hampton 1995, Dummett 2001, Bader 1997). But this approach navigates the trade-off between the interests of would-be migrants and citizens, and responds to the problems on both sides, by concluding that a middle-way is the obvious alternative, rather than by identifying the conditions under which borders should be open or what claims they ought to be open to.

This 'middle way' view is legitimised by the observation that there is a gap between theory and practice to the extent that 'it should be admitted that the prospect of states opening their borders completely is a remote one' (Kukathas 2005: 210). However, the relationship between theory and practice differs according to which argument for open borders you subscribe to. Those who advocate the distributive justice argument for unrestricted immigration and reject the right to free movement suggest that if we had rough international equality, normative arguments in favour of closure would be legitimate, so immigration is a non-ideal state (Bader 1997). Conversely, those who believe we have a presumptive right to free movement acknowledge that, in practice, there are good reasons to restrict this principle to some extent, so the ideal of immigration is restricted by contingencies of the modern state system (Carens 1992).

These arguments plainly conflict; on the one hand it is only permissible to make arguments which prioritise compatriots in an ideal world with rough global equality, and on the other the real world demands that we consider practical arguments for closure as we need to acknowledge the fact that liberal democratic states assume their right to control their borders. The two arguments also pull in different directions in respect to the type of claims they consider valid. The right to free movement means that anyone has a good claim to enter as a matter of basic liberty. The distributive justice argument suggests we should let in the most needy. This is a contradiction between the two cardinal principles of equal, universal basic liberties, and equality of opportunity, at the heart of the liberal discussion of immigration. The divergent conclusions recommended by the two liberal arguments, and the negative, conditional nature of the global distributive justice argument, lead many theorists to take the arguments for closure more seriously than they would have otherwise done. The general conclusion is then that arguments from both sides are partially flawed, but that it is at least clear that liberalism demands much more open borders than is the practice in most liberal democracies. The problem is left unsolved on the basis that it is somehow irrelevant as that states should have more porous borders is uncontroversial.

I have a number of suggestions in response to these observations, however what follows is merely a sketch: this chapter is a preliminary one, not the primary area of research of my thesis. Further research will be necessary to develop the intuitions outlined here. With this caveat, my first argument is that the implication that any liberalisation in admissions would promote global justice is incorrect. Admitting only highly skilled migrants, even if it represented significantly ‘more open’ borders in certain states, would in fact contribute to global poverty. Surely the global duties of states are not merely to those who successfully migrate, but also to those who are left behind. Like Seglow (2006: 6), I believe we ought to prioritise admissions of poorer migrants from poorer states, so unskilled labourers should have more chance of migrating, and skilled workers less. This is a point about priority: if borders are to be only a bit more open, we should prioritise those who would benefit most from migration. We should also consider how border policy impacts on those who are unable to migrate. This means transferring resources to states who have provided large numbers of medical or highly-skilled workers, for example.

It follows that states can permissibly admit people as part of fulfilling their global obligations, within the constraints above. Their responsibilities of global justice may, but need not, be discharged through migration. As I said earlier, individuals have the right to a decent life, but not the means by which it is achieved, and this is a right that is held against their own state, not another. Nonetheless, to the extent that rich states fail to fulfil their global obligations, the legitimacy of closing borders against the claims of individuals whose right to a decent life is not being met (because, I am assuming, their states cannot fulfil them in part because of the injustices the rich states contributed to) is undermined. This explains the force of the claim of migrants to enter despite the fact that they do not have the right to do so.

This observation also informs two additional ways in which borders should be open. First, claims of *reparation* (individuals who have been adversely affected by the historical decisions or policies of the would-be state of migration), and second claims of *membership* (from refugees or stateless persons). Claims of reparation are owed to those states who have been adversely affected by conflicts, occupation, colonialism, or other past injustice. A state, as the representative of the collective decisions of the citizenry, has a duty to another state if it has dominated the state through colonialism, occupation, or economic domination. Migration is thus a way of rectifying past injustice and acknowledging the collective responsibility of the dominating state. In terms of duties of migration, this is the flip side of Miller’s claim that countries should not be able to ‘export’ their population problems. If the problems a state faces are partly the result of domination by another state, then it is legitimate to export some of its population and the dominating state should accept a proportion of its population. This principle is not incompatible with the current practices of many states, which tend to prioritise entry of members of past colonies, and of those who have been affected by recent wars.

The individual claims of those who lack membership, on the other hand, are compelling because refugees' right to a decent life cannot or will not be met by their state of citizenship. I think that we should adopt a broader definition of refugee however, to include individuals who fear persecution for any reason, not just because of their membership in the groups identified in the Geneva Convention. In addition, we should add to this category those whose basic needs are not being met by their state of citizenship, in other words individuals who are the subject of extreme neglect. Of course, this means that a huge proportion of the global poor have the right to migrate, on my account. I think this is right, but there are two reasons why my account is less expansive than other versions of this argument. First, it is unlikely that most of those whose basic needs are not being met will be able to migrate, so we should focus on improving the conditions for these groups in their state of residence (and they are unlikely to contribute considerably to immigration flows as they are not generally would-be migrants). Second, the obligations to refugees are shared by all rich states so states only have an obligation to take in their fair share.

One objection that has been raised to priority for refugees is why those seeking asylum are seen as having strong claims, when so many more destitute migrants cannot even get to the point where they are able to do so. Pogge (1997: 23) deems this a case of 'mistaken priority' and contends it is the result of seeing refugees and asylum seekers as 'persons with a face', and 'as having stepped forward and knocked on our door and told us their story'. However, one reason why this is the case can be illustrated with the principle of non-refoulement, where individuals cannot be returned to countries where they have a well-founded fear of persecution. The fact that individuals claim refuge from a particular state means that the state would have to use its power of deportation to return them, so the individual becomes the state's responsibility. I would like to argue that this is because the duty to provide these individuals with a decent life which is not being met by their country of citizenship becomes *reallocated* to the state they claim refuge from. Refugees are the shared responsibility of rich states, as I said earlier, but rich states do not take in nearly as many refugees as they should. Therefore, when someone claims asylum on the territory, these unallocated obligations become assigned to the particular country.

One outstanding question concerns the status of irregular migrants. It would never be right to deport someone to a state where someone might be killed or tortured. This raises the question of whether there is a similar restriction against deporting someone to a situation of destitution, as their life chances if they are sent home are also extremely poor. The answer will require further consideration. On the one hand, to the extent that states have not fulfilled their global obligations as set out in the last section, someone who is on their territory who would otherwise be destitute has a good claim to remain. This is because they have become the responsibility of the state, as the state would have to

exercise their power to deport them. Because the migrant has the right to a decent life which is not being met in their state of origin, and the state has unfulfilled global responsibilities, the responsibility to provide the migrant with a decent life becomes reassigned to the new state. On the other hand, the argument seems wrong as it implies that someone gains the right to stay by finding their way onto the territory of the state, by whatever means. As I argued in my discussion of coercion and relative equality, the implications for irregular migrants need to be developed further.

In conclusion, I have argued that borders should not just be 'more open' or 'fairly open' as this might perpetuate global justice, but should be selectively open to certain claims: those of membership and reparation. I further suggested that asking whether those present on the territory have the right to stay, rather than whether those who would move here if they had the right to come, shifts the terms of the open borders debate in interesting ways. I concluded the chapter by identifying irregular migrants as a particularly thorny issue. My next chapter takes up the question of irregular migrants, by examining the role of immigration status in securing the enjoyment of legal rights. It critically assesses the first response to denizenship in the literature: that it is problematic if it is a status of rights vulnerability.

Chapter 3 – The Tyranny of the Enfranchised Majority? Denizenship as Rights Vulnerability

The debate about the legitimacy of constraints on democracy is as old as Plato and as young as contemporary debates on whether we need a British Bill of Rights. Both sides of the debate – advocates of legal constitutionalism and critics of judicial review and constitutional rights – are motivated by concerns about the way in which political power can be a source of tyranny and oppression. ‘Legal constitutionalists’ worry about the ‘tyranny of the majority’, that vulnerable minorities will find themselves the victim of the capriciousness of popular democracy. Rights should be insulated from the rough and tumble of politics and guarded by independent trustees with no interest in re-election or subjection to political pressure. Constitutional rights sceptics or ‘political constitutionalists’ express concerns that the delegation of power from democratically elected representatives to unelected authority will lead to unequal concentrations of power as the judiciary lacks the incentive to be responsive to all interest groups. They argue that the fact that there is reasonable disagreement about the correct set and form of rights means entrenching them in a supra-legal document promotes the elitist status quo and undermines political equality.

Much of this debate turns on how democracy versus rights protect vulnerable minorities. This chapter enters the debate from one, undertheorised perspective: how democracy and constitutions protect *disenfranchised* minorities, specifically, resident non-citizens or ‘denizens’. Denizens raise a moral problem as they are subject to the coercive apparatus of the state without political rights; they are subjects rather than citizens. *Prima facie*, legal constitutionalism fares better as it seeks to step in where democracy fails by developing systems to protect minorities against democratically-enacted legislation which harms them in some fundamental way: namely, by violating their rights. As I will show, however, the identification of a rights-holder is often a political decision, and states lack the incentive structure to protect the rights of non-citizens. In examining these two opposing accounts, my aim is not to come down on one side of the constitutional rights and judicial review debate. Rather, I aim to scrutinise the coherence in the way that each position identifies the problem of denizenship, and their proposed response.

The two positions assessed here each imply that denizenship is problematic to the extent that it is a status of *rights vulnerability*. The legal constitutionalist or henceforth ‘liberal rights’ approach sees denizenship as troubling to the extent that it constitutes only a partial guarantee of one’s moral rights as a human. Thus if the human rights of denizens are imperfectly codified in the national laws of the countries they live in, this is a problem. On the other hand, the political constitutionalist or

henceforth ‘democratic republican’⁹ view is that denizenship is a status of rights vulnerability because it is a status of political exclusion, and the security and value of rights is conditional on the right to participate in the democratic process. In this chapter, I attempt to show that neither position correctly construes the problem of denizenship. By conceiving of denizens as definitionally ‘dominated’, the democratic-republican account cannot determine under what conditions the status of denizenship is problematic. It suggests someone who has recently arrived in the country who has citizenship elsewhere is as dominated as a stateless migrant who has been politically disenfranchised in the country for decades. Similarly, the liberal rights approach, by identifying the problem of denizenship with the absence of rights, debars itself from making the argument that lacking certain rights is wrong in some circumstances faced by denizens but not others. I further contend that the liberal rights approach lacks an account of how political power shapes the way that rights are determined in public policy, resourced, and balanced against each other. It is also insensitive to how political decisions influences eligibility as a rights-holder.

I: The Rights Approach to Denizenship

Transnational migration is a key challenge of our time, and one that is rarely off political agendas. But in political philosophy immigration is undertheorised; cross-border movements have been the object of ‘scant’ attention (Benhabib 2004: xiii). To the extent that it has preoccupied philosophers, immigration has been theorised according to three main approaches. In the last chapter I examined the first: admissions and the case for open borders. The second, access to citizenship, will be the subject of the next chapter. The third considers integration, multiculturalism and cultural rights (see Kymlicka 2001). The issue of what claims immigrants make on states by virtue of their status as non-citizens (rather than as non-residents, potential citizens or immigrant-citizens) has been less thoroughly examined. When it is, it is usually as a matter of the rights enjoyed by resident non-citizens.

The rights of non-citizens is an obvious place to start in examining how, if at all, denizenship is problematic. One of the earliest discussions of the harm inherent to statelessness, an extreme version of denizenship,¹⁰ argued that to lack citizenship is to entirely lack status as a rights-holder (Arendt

⁹ I depart from the more commonly used term ‘legal constitutionalism’ because I wish to explore the broader approach which sees immigrants as transnational rights holders from a legal human rights or sociology of immigration perspective, rather than confine myself to debates in democratic theory. The two positions are not identical, but are compatible in their fundamental principles, and together they constitute the dominant approach to studying resident non-citizens. My use of ‘democratic-republican’ rather than ‘political constitutionalist’ is in a sense narrower – I wish to focus on the arguments of republicans who see political participation as fundamental to non-domination rather than on the wider category of critics of judicial review who can include republicans, political constitutionalists, or democratic liberals. The terms are not ideal as they suggest a rather crude division between the two sides.

¹⁰ Statelessness is the state of lacking citizenship anywhere whereas denizenship is the state of lacking citizenship in one’s state of residence.

1967). Yet the term *denizen* was introduced to immigration theory discourse precisely to illustrate that lacking citizenship no longer entails rightlessness, indeed the term ‘*denizen*’ carries with it connotations of almost-citizenship or half-citizenship, unlike the more pejorative ‘*alien*’ or the legal term ‘*foreign national*’. Tomas Hammar (1990) used the term for long-term resident non-citizens who by virtue of their permanent residency status were granted many of the rights of citizenship. Hammar was resurrecting an English Common law term where a foreigner was granted some of the rights of citizens including the right to own English land by royal prerogative (Berry 1944). Hammar’s agenda in reviving the term was to conjure up the idea of something like citizenship but not citizenship, similar to Blackstone’s (*Commentaries* 1: X: 374) description of *denizenship* as ‘a kind of middle state, between an alien and a natural-born subject’. In a similar vein, Yasemin Soysal (1994) argued that the extension of traditional citizen rights demonstrated that ‘universal personhood’ rather than citizenship status had become the central criterion upon which rights are allocated. This perspective sees the decoupling of rights from citizenship through the human rights architecture of the modern world as a triumph of the human rights movement, and presents *denizens* as the test case of this process. It therefore opposes the received view that rights and citizenship are fundamentally connected in the way that commentators had thought them to be following in the tradition of T H Marshall (1964), who argued that the history of rights had been a three-step process whereby citizens were accorded civil, then political, then social rights. Summing up the criticism to the citizenship-rights view, Layton-Henry (1990: 118) argues that ‘there is a continuum of rights attached to membership of a state rather than a sharp distinction between citizen and non-citizen’.

Moreover, this narrative also challenges Marshall’s understanding of the direction of the rights trajectory, pointing out that immigrants as *denizens* were granted welfare rights early on while political rights are generally considered the preserve of the citizenry (Bauböck 1994b, Guiraudon 1998a). These social rights include the right to education in public schools, access to welfare and benefits systems, health care and even in some cases extra-territorial rights such as the right not to lose contributions to national insurance schemes or pensions schemes when moving abroad (Soysal 1994, British Institute of International and Comparative Law 2008). The ‘universal personhood’ argument also emphasises the fact that various supranational rights declarations over the last 60 years have formalised the responsibility for states to recognise the rights of all whether they are citizens, legal residents, or even undocumented migrants,¹¹ and human rights instruments have focused attention on vulnerable minorities through discussions of the legal protection of migrants, national minorities and

¹¹ These include the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, the Vienna Convention on Consular Relations, the Convention on the Reduction of Statelessness and the Convention relating to the status of Stateless Persons, the International Convention on the Protection of All Migrant Workers and Members of Their Families, the Migration for Employment Convention, the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, and the United Nations High Commissioner for Human Rights Principles and Guidelines on Human Rights and Trafficking.

indigenous people (Van Den Bosch and Van Genugten 2002).

However, there are reasons to be cautious about embracing the full implication of this narrative: that denizenship is no longer an unfavourable status. Equal social rights are often accompanied by a range of problems faced by resident non-citizens in relation to immigration status, xenophobia and access to public services (Weissbrodt 2008). Other commentators highlight the thinner rights packages granted to short-term, undocumented or vulnerable groups of migrants or ‘margizens’ and the extent to which immigration status determines rights (Martiniello 1994). Undocumented migrants are also susceptible to a well-known ‘chilling effect’ in relation to their rights as their lack of legal status makes them effectively like outlaws, unable to rely on authorities for security or service provision for fear of being detained or deported (Bosniak 2010). Moreover, some states have taken steps recently to limit the socioeconomic rights of non-citizens who have recently arrived or who have temporary immigration status.

Nonetheless, scepticism about the reach of the ‘universal personhood’ narrative does not entail *rejecting* the rights approach to denizenship. On the contrary, a rights approach is advantageous precisely because it can tell us that ‘margizens’ raise more of a problem for liberal principles than denizens, for example. A rights approach enables us to identify groups such as undocumented migrants, temporary migrants and those without recourse to public funds as occupying a less favourable status than other groups of denizens. It also coheres with our intuitions about the relatively advantageous status of EU denizens; indeed our reasons for thinking that EU denizens are relatively well off are likely to include the substantive rights package to which EU denizens are entitled. Furthermore, a rights framework enables us to identify certain risk factors which are likely to lead to problematic forms of denizenship, including lack of legal status and certain types of visas.

This is not as straightforward as it appears however, as we might wish to consider whether or not the notion of rights vulnerability is a *relative* measure whereby the factor we care about is the difference between the rights of denizens and the rights of citizens, or an *absolute* measure where we consider denizenship to be problematic for those groups who lack a basic minimal set of legal rights or for whom there is insufficient entrenchment of their human rights. This question will be returned to later in this chapter. Another consideration is the relationship between the legal entrenchment of certain basic rights and certain ‘meta-rights’, such as the right to permanent residence, the right to vote, and the right to citizenship. Some philosophers have reproduced Arendt’s description of the ‘right to have rights’ to illustrate the way in which citizenship functions as a meta-right in two related ways: first because it constitutes a right not to have one’s rights taken away and the right to recognition as a rights-holder (rather than merely the passive enjoyment of a certain set of rights x , y and z), and second because it alone confers the right to participate in the determination and configuration of

rights through the democratic process. This characterisation of rights has been termed ‘political constitutionalism’ and is the view that rights ought not be entrenched in constitutions and separated off from representative democracy. Henceforth this will be referred to as the ‘democratic republican’ approach.

Both the liberal-rights approach and democratic republican approach see denizenship as a status of rights vulnerability, but for two different reasons. The liberal-rights approach suggests that denizenship and specifically the political exclusion it entails need not be problematic if denizens enjoy a generous package of rights, but identifies certain types of denizens as of concern for this reason. The democratic republican approach situates rights vulnerability in the status of subjecthood, which entails being granted rights at someone else’s discretion. These two approaches, and how they respond to the problem of denizenship, will be explored in greater depth in the next two sections. My analysis starts from the assumption that people have a panoply of moral rights by virtue of being human, and that these have been partially codified in international and national law to the extent that human rights norms have a quasi-legal status.

II: The Liberal-Rights Approach to Denizenship

The liberal-rights approach aspires towards perfect continuity between human rights, and legal and constitutional rights. This is in part a normative commitment to the principle that if rights exist they ought to be codified, in other words that all moral rights should be legal, if not constitutional, rights (for an opposing view, see Waldron 1999). From this perspective, denizenship is problematic if it constitutes an inadequate codification of the moral rights of the individual. However it is also an interpretive view that construes the extension of legal rights to denizens as evidence of the proliferation and entrenchment of human rights norms (Soysal 1994), rather than of a more flexible understanding of the citizen as rights-holder.

The liberal-rights approach to denizenship is therefore philosophically rooted in a legal constitutionalist understanding of rights. This view is predicated on the assumption that minorities need to be protected against the policies and legislation enacted by popular democracy. In Ronald Dworkin’s (1977) influential account, rights are ‘trumps’ on everyday politics, which is defined by utility- and efficiency-based decision-making. The moral rights we hold against governments should be enshrined in a constitution in order to prevent administrations from ‘enacting laws or adopting policies that would otherwise seem attractive’ (2006: 30). Rights should be guarded by trustees with no interest in re-election and thus independence from political pressure. The liberal-rights approach therefore seems well equipped to deal with the moral claims of resident non-citizens as it advocates rights protection by the judiciary. Their rights are placed in the hands of people who are not at the mercy of the demos and the whim of the popular press, which is notoriously anti- immigration and immigrants’ rights. In Dworkin’s view, the moral rights we hold against governments are *human* rights.

In recent work (Dworkin 2006, 2002), he has made clear that these are not just constraints on ordinary policy-making, but also on the extent to which states can further the interests of their own nationals. Thus rights are not only trumps against ordinary policy-making but against the sort of policy-making that promotes national interest above all else.

The broader liberal constitutionalist conception of democracy also lends itself to reinterpretation in response to the existence of denizens and, accordingly, a larger populace than electorate. As Dworkin (2000, 1996) makes clear, a legitimate democracy is a matter of outcomes rather than procedures – its primary goal is to treat its members with equal concern and respect rather than to facilitate their participation in the political process. This is because he believes that political equality can have little meaning in large democracies: equality of political impact is impossible given the asymmetry of power between representatives and the electorate, and equality of influence is undesirable in a democracy which values a free press and rigorous public argument. Importance is placed on political participation for its symbolic, agency and communal benefits rather than fundamental role in protecting individual freedom. It is symbolic in that by including all citizens they are affirmed and recognised as equal members; it facilitates agency by connecting participation with each individual's moral experience; and it is communal by involving individuals in the collective enterprise of shaping a community. The implication is that resident non-citizens can benefit from living in a democracy even if they lack the right to participate in democratic processes as political rights have no instrumental function in protecting rights.

Thus, normatively-speaking, legal constitutionalism can clearly underpin a coherent approach to denizenship. It also makes concrete empirical predictions about the shape of denizens' rights protection in modern democracies. Specifically, the liberal-rights approach suggests that the rights of non-citizens will be adequately protected in constitutional democracies where persons rather than citizens are understood as the bearers of rights. As Joppke (2001: 55) observes, '[i]f one defines individuals' rights as 'trumps' over the preferences of the government-represented majority in society, one could argue that immigrants – by definition excluded from this majority – are the most dramatic test case of rights in general'.

If immigrants are the paradigm subjects for testing the 'rights as trumps' model, the United States must be the paradigm case scenario in that its Constitution has been described as one where 'the concept of citizenship matters very little' and which 'prescribes decencies and wise modalities of government quite without regard to the concept of citizenship' (Bickel 1975: 53-4). Indeed, the constitutional understanding of the person (rather than citizen) as rights-holder has been borne out in landmark cases like *Plyer v. Doe*, where the Supreme Court rejected Texas's claim that undocumented migrant children were ineligible for education and reaffirmed that even illegal non-citizens 'have long

been recognized as ‘persons’.¹² California’s Proposition 187 which withdrew undocumented migrants’ access to public services was also found unconstitutional.

Elsewhere, I have argued that a ‘rights constituency’ is a useful metaphor for conceptualising these debates about the eligibility to rights of irregular migrants and others (Benton forthcoming). To be in a rights-constituency, as for an electoral constituency, is to be eligible for the entitlements connected with the constituency. The metaphor captures the way in which the boundaries between who is and who is not eligible for certain rights can be negotiated, contested and redrawn. Redrawing can be the result of appeals by members and non-members, as in the civil rights struggles in the US, or it can be the result of reconfigurations for the political gain of powerful actors, as in the exclusion of unpopular groups such as undocumented migrants from health or education rights constituencies. As in the case of electoral constituencies, this can be described as a process of ‘gerrymandering’ – manipulating boundaries to favour or disfavour certain groups to achieve the results sought by the incumbent administration. The history of how eligibility for rights has been contested in the archetypal constitutional democracy demonstrates this kind of ‘rights gerrymandering’. From the definition of slaves as lacking legal personality and devoid of rights to the Supreme Court’s characterisation of free African Americans as having ‘no rights which the white man was bound to respect’, debates about eligibility have often accompanied a seemingly settled picture of universal rights (Neuman 1996).

The rights constituency metaphor casts new light on the well-publicised affronts to human rights in the post-September-11th counter-terrorism measures in the United States and Guantánamo Bay. Seen from this perspective, these moves are not just a grave *affront* to human rights or civil liberties but an illustration of the deeper rights vulnerability of denizens. The Bush administration did not just violate rights or bend the rules, but attempted to reinterpret or redraw rights constituencies to modify the status of denizens as rights-holders. The geopolitical dimension to rights can be seen most clearly in the case of Guantánamo. An off-shore detention centre, Guantánamo has been described as a ‘state of exception’ (Agamben 2005) and as a ‘deliberate series of legal and geographical contradictions’ designed to avoid legal restraints (Comaroff 2007). Both territory and legal loopholes were used to try to control rights eligibility. While Guantanamo was made legally possible on the basis of the fact that suspects were ‘unlawful combatants’ (Seelye 2002) – a term constructed to take advantage of a loophole to circumvent protections for prisoners of war in the Geneva Convention and the normal legal process – the differential treatment accorded non-citizens by the Patriot Act was justified by the fact that foreign policy and immigration were subject to executive, not judicial control.¹³ Similarly, the

¹² *Plyer v Doe*, 457 U.S. 202 (1982)

¹³ It should be noted that Guantanamo has been subject to a string of legal challenges, the most prominent of which was the 2008 *Boumediene v Bush* Supreme Court decision that under the US Constitution, federal courts can review *habeas corpus* petitions of ‘enemy combatants’ held at Guantanamo and that the Military Commissions

practice of extraordinary rendition can be seen as an attempt to exploit geographical space for political gain. Additionally, and not confined to terrorism issues, deportation is often used to remove unpopular residents such as those who have overstayed their visas or entered the country without documentation, as well as any non-citizen – regardless of the time they have spent in the country – convicted of violent or drug crime. Finally, detention of undocumented migrants, victims of trafficking and asylum seekers has vastly increased post 9/11 (Weissbrodt 2008). All these policies can be interpreted in rights constituencies terms; as removing people from rights constituencies, creating an exception to a rights constituency or redrawing a rights constituency.

This process of reshaping rights constituencies to include or exclude denizens calls into question the interpretation of the extension of rights to denizens as a triumph of the codification of human rights, and sees it as a development in the understanding of the ‘resident’ to include denizens as well as citizens (Joppke 2001). If this is the case, then the rights of denizens are sensitive to the ebbs and flows of political opinion. Along these lines, Joppke observes that decisive moves in favour of immigrants’ rights have generally been made at times of low interest in immigration and an absence of political and social crisis. In a similar vein, Guiraudon (1998b) argues that the process of rights expansion has been dependent on the concealment of immigrants’ rights issues from public discourse and the framing of the issue as a bureaucratic and judicial debate.

There are three concerns about the liberal-rights approach that stem from these sorts of observations. The first concerns the *narrative*: namely, the rhetoric around proliferation and expansion of human rights norms, the sense that this is a one-way process, and the acclamation about the triumphs of constitutional law over more parochial state legislation on undocumented migrants. Presenting this narrative as fundamentally positive masks the cracks that appear in the rights framework and specifically the disruption between the continuity of human rights, constitutional rights and legal rights. It also diverts attention away from where the gaps do exist, including in relation to undocumented migrants. Summing up this objection, Rubio-Marín (2000: 4) maintains that ‘those who speak about the complete devaluation of national citizenship often do not seem to take fully into account the increasingly important phenomenon of illegal immigration [...] The general precariousness that residential instability introduces into illegal immigrants’ legal status is sometimes relegated to second place and the main focus is directed on to the fact that even illegal immigrants are now sometimes granted social benefits and basic human rights’.

Act of 2006 did not suspend that right for detainees. The principle that foreign policy is subject to executive control has often been challenged – Joppke (2001) argues that interpretations of the Constitution have been polarised by two main principles, the ‘plenary power’ principle which grants the government unconstrained judicially nonreviewable authority over immigrants, and the ‘personhood principle’ which protects resident aliens by the constitution. As neither principle is included in the Constitution, negotiations between the two poles are the result of the social, political and juridical environment.

Of course, this is a concern about gloss and emphasis, not a fundamental objection to the liberal-rights framework. Moreover, it pays scant attention to the potential of the rights framework to criticise counter-terrorism measures. Dworkin (2002) has commented on the US Patriot Act and its violation of the moral principle to treat individuals with equal concern and respect; he argues that it violates the legal constitutionalist principle that rights are a constraint on the safety, security and efficiency public decision-making of governments.

The second concern is therefore more fundamental, as it is based on the view that fractures in the rights framework are *necessary* rather than contingent due to the way in which rights are realised in a world of nation-states with sovereign power over their borders. The policing of borders is widely understood to legitimise the power of the state over deportation and detention for those who lack legal permission to live in the state. I indicated above that deportation, like extraordinary rendition, is problematic in rights constituencies terms as it demonstrates that the denizen rights proclaimed by Soysal are in fact dependent on continued residence in the rights-according jurisdiction. However, the power of deportation casts a wider shadow over rights protection as the mere threat of deportation has ramifications on the effective ability of certain immigrants to claim their rights. At the extreme, undocumented migrants are unlikely to report crimes to the authorities or seek civil redress for maltreatment for fear of deportation. Moreover a culture of ‘turning a blind eye’, as exists in parts of the United States, means that migrants’ access to public institutions depends upon the goodwill of officials not to report them (Mahler 1995). This ever-present risk of deportation has a ‘chilling effect’ on the rights of undocumented migrants, as well as on ‘legal’ migrants if they have lost their documentation (Gibney 2000). As Justice Brennan argued in *Plyer v. Doe*, irregular migrants’ ‘presence is tolerated, [their] employment is perhaps even welcomed’ yet they are ‘virtually defenceless against any abuse, exploitation, or callous neglect to which the state or the state’s natural citizens and business organizations may wish to subject them’ (cited in Bosniak, 2006: 67).

To a lesser extent, the threat of deportation hangs over other groups of vulnerable migrants. States retain the right to deport non-citizens at their discretion, a practice generally reserved for those convicted of violent crimes. But Bosniak observes that ‘status noncitizens are potentially deportable by definition. An alien is a person who is present in a state’s territory only conditionally’ (68). Recent studies have found that some migrants lack effective awareness of their employment rights and consider they have no option but to remain in an exploitative job because they feel disinclined to draw attention to themselves and feel that their continued residence in the country is conditional (Equality and Human Rights Commission 2010). The inflammatory media reaction to high profile cases of *non*-deportation, in other words where a non-citizen is not deported because of the principle of *non-refoulement*, must compound the sense of discretionary, insecure status some immigrants feel. To the

extent that this threat of deportation is *perceived*, even migrants who are not at risk of deportation may be susceptible to a chilling effect in relation to their rights. The independence of legal or constitutional rights alone cannot therefore demonstrate that the absence of citizenship is unimportant to rights.

Against these criticisms, the liberal-rights theorist would probably maintain that these examples simply demonstrate the absence or ineffectiveness of rights in practice rather than a fundamental problem with the rights approach per se. There are three ways that the liberal-rights theorist could make this argument. First, the liberal-rights theorist could contend that much of my argument from rights constituencies and the impact of the threat of deportation rests on the assumption that denizens lack the right to remain in a country. This might therefore indicate that we should give denizens the right to remain, or a right against deportation. A second counter-objection from within the rights constituencies framework is that the rationale behind the rights response is precisely that if rights that are understood as stemming from membership in a certain group, rather humanity alone, then gaps in rights provision arise. It is only when rights are guaranteed to all humans regardless of their membership or presence in various jurisdictions that rights constituencies will be eliminated. From this perspective, we should see the Supreme Court decisions in favour of the rights of undocumented migrants as small steps towards the much broader ambition of realising and legalising a deep and consistent global human rights network. It follows that the United States is an imperfect constitutional democracy and that a convincing argument against the rights framework can only be made in response to an *ideal* constitutional democracy. A third, related point might take a similar form: much of my argument was based on the limited rights granted to undocumented and other vulnerable migrants. In order to successfully demonstrate that the problems with the rights framework are inherent to the approach rather than a matter of the realisation of rights in practice, I would need to show that they apply not only to these vulnerable groups but also to the ideal rights-holding denizen, in other words, a denizen with the full range of social and civil rights.

However, there is a third objection that might hold even in the ideal, just, liberal constitutionalist state. In Dworkin's theory, rights are a constraint on the extent to which governments can prioritise their own citizens in policy-making, and these rights are held whether someone is a citizen or not. Nonetheless, it is still justifiable for a state to prioritise its own citizens. Dworkin (2000: 6) says that equality is the 'special and indispensable virtue of sovereigns', therefore the implication is that the principle that governments ought to treat their citizens with equal concern and respect applies only to citizens. This might undermine the argument that the political exclusion of denizens is unproblematic, for two reasons. First, I described how, for Dworkin, the lack of emphasis on actual political influence was justified on the basis that a democracy is more about the outcome-based ideal of treating people as equals rather than the procedural ideal of treating them as political equals. However, if denizens are not relevant moral units for this outcome ideal either, then the argument does not have the same

force. The second problem will be examined in the next section. This is the rather more fundamental objection that rights in fact cannot be isolated from everyday policy-making because their realisation requires resources and decisions. I will consider this objection next.

In the next section, I therefore turn to objections to the liberal-rights model that apply to the ideal rights-holding denizen. These arguments have been made most forcefully by sceptics of judicial review and political constitutionalists, what I call ‘democratic republicans’. However, my purpose in examining these arguments is not merely to interrogate the liberal-rights model further, but to examine an alternative perspective on the rights vulnerability of denizens, specifically, that it is constituted by their lack of political rights.

III: The Democratic-Republican Approach to Denizenship

The democratic-republican account conceptualises denizenship as a status of rights vulnerability in a different way to the liberal-rights approach. It suggests that denizenship is a status of rights-vulnerability because citizenship functions as the ‘right to have rights’: citizenship entails that someone is understood as a legitimate rights-holder who has the right to make claims on others. Moreover, rights are seen as the product of political determinations, thus exclusion from this process is problematic. Even in the case of the ideal rights-holding denizen in the ideal constitutional democracy, the lack of political rights would be manifestly problematic. Additionally, the democratic-republican account suggests that the ‘grey area’ of a rights constituency is not just a matter of imperfectly realised rights frameworks, but an inherent effect of lacking the ‘right to have rights’.

As citizenship is conceptualised as the ‘right to have rights’, to lack it is by definition a status of rights vulnerability. Democratic-republicans like Richard Bellamy invoke Arendt’s phrase in order to argue that the right to political participation is a kind of ‘meta-right’; more significant, valuable and crucial to self-worth and independence than any other rights. Bellamy (2001a: 38) contends that struggles to be included as political subjects were not demands for ‘access to a pre-constituted set of political rights’ but for the right to change the ‘terms and conditions’ of citizenship. What is important is not second-order rights provision but the primary right to share in their determination. Thus, without the right to be a rights-holder, having a set of rights x, y and z is hollow and the rights in question are endangered. Bellamy maintains that being merely the passive recipient of a set of legal rights is akin to the granting of rights to children or slaves – he quotes Weller’s claim that ‘you could create rights and afford judicial remedies to slaves’ in order to make the point that citizenship is more than a package of rights (cited in Bellamy 2001b: 41).

The comparison with slavery indicates the republican dimension of Bellamy’s argument. He maintains that rights enjoyed at other’s discretion depends on currying favour with the powerful, ‘domination’, in the republican terminology. Denizens are *de facto* subjects which is manifestly problematic from the

political constitutionalist viewpoint as subjects are 'subordinate to their rulers, depending for their rights on finding favour and influence with those in power' (2008b: 600).

The second insight the democratic-republican account provides in relation to denizenship also pertains to their political exclusion. This is that political power shapes the way in which rights are determined and weighed against one another. Bellamy points out that due to the costliness of rights provision, even 'negative' rights, like the right of habeas corpus, require financial resources. Rights cannot be detached from normal political decision-making as they need to be weighed up against each other. Thus rights are costly, collective political decisions; we cannot just 'add on' rights indefinitely to achieve a maximal package. Moreover, rights are valued not merely for their worth for individuals but for their role in providing collective goods (Bellamy 2001a). If this is the case, then the fact that policy-makers are not accountable to a subset of rights-holders means that the determination of rights is likely to be skewed in favour of those who are enfranchised.

The form of democracy that democratic-republicans espouse also disfavours denizens. According to democratic republicans, the collective dimension of rights means that we should be wary of enshrining a catalogue of rights and thus removing them from debate and discussion by democratic representatives. The 'fact of disagreement' – that reasonable people, including philosophers and politicians, disagree about both the right and the good (Bellamy 2007)– leads to the 'circumstances of politics' – the need to make binding collective decisions in the absence of any test of objectivity and while reasonable parties disagree about what is right (Waldron 1999). These problems of disagreement over rights are replicated in the judiciary. Members of the judiciary are equally likely to have to resort to majoritarian voting, but extreme or unconsidered views may have disproportionate impact as there are fewer people voting (Sunstein 1993). This is likely to lead to unjust concentrations of power which privilege political elites. Constitutionalism effectively privileges the status quo as a supermajority is required to change legislation - it replaces rule by a majority with domination by a privileged minority (McGann 2004). Scepticism about judicial review rules out the kind of rights protection for those who are inadequately represented in the political process – or not at all in the case of denizens - which is the main advantage to the liberal-rights response to denizenship.

In an analysis of the way in which reform occurred in France, Germany and the Netherlands, Guiraudon (1998a: 303) argues that it is precisely the depoliticisation of rights which benefited migrants: 'containing debate behind closed doors (the doors of ministries or of courtrooms)'. Political debates about reform of immigrants' rights have tended to be susceptible to the 'election-migration policy cycle' and dependent on the absence of social and political unrest. Guiraudon explains how national policy-makers evoke transnational rights norms when they promote pro-denizen laws, but that this is not what motivates them. Industrial rights for migrants workers in France were prompted

by a series of strikes which made the government fear social unrest and additional repercussions. Moreover, policy-makers are likely to consider provisions for foreigners as benefits rather than rights: 'Their decisions thus obey a different logic, based on economic calculations, interest group pressure, or a desire to diminish the attractiveness of immigration' (285). Guiraudon concludes that the scope of the debate and who is included therefore has a distinct bearing on the likely outcome. It follows that a situation where rights are politicised in the way that democratic-republicans desire, and immigrants are politically excluded, is the worst of both worlds. Guiraudon's argument indicates that if immigrants are excluded from the political process, it is better for rights not to be politicised. Therefore this point provides support for the liberal-rights approach to denizenship.

In sum, the empirical observation made by democratic-republicans, that political power shapes the enjoyment of rights, is sensitive to some of the cracks identified in the liberal-rights account. However the normative claim that rights ought not to be isolated from democratic processes actually disadvantages denizens. The irony is that although the democratic-republican approach is more adequately equipped to *identify* the problem of denizenship, it is poorly equipped to *address* it. It identifies the problem clearly; denizens are definitionally dominated in the republican tradition as they are not citizens, and citizenship is necessary in order to be non-dominated. However, *because* citizenship is necessary in order to be non-dominated, and rights, participation and citizenship cannot be disaggregated, a solution is impossible.

One manifestation of this tension between descriptive accuracy and normative roadblock is as follows. Bellamy (1999: 175-6) identifies four dimensions of politics and describes how all – the spheres, subjects, scope and styles of politics – are contestable, and therefore should be subject to debate and determination in the democratic process. He maintains that democracy is self-defining and has been determined through 'constitutional conventions of dramatic change' and the 'struggles of democratic movements to gain recognition for excluded groups'. The insight that the fabric of democratic membership is not set in stone and that the potential of democracy is revealed in debates about its self-definition is key. However, it cannot be the case that the subjects of the polity are democratically established. This is a well known paradox of democratic membership - even a referendum on membership issues would have necessarily already decided the issue, as if 'non-members' were included then their inclusion would make them members (Bauböck 1994b, Rubio-Marín 2000).

Even more problematic is that the democratic-republican approach assumes that the demos and the populace are one and the same. The approach is silent on the claims of denizens; unlike liberal-rights theorists, democratic-republicans simply do not consider the existence of disenfranchised minorities. Consider McGann's (2004) critique of the 'tyranny of the majority' argument which claims that

majority rule offers the best protection for ‘the worst-off minority’. It seems to me that the worst-off minority is likely to be a non-citizen minority. This oversight is surprising as democratic-republicans are especially well placed to see that majority rule does not provide adequate protection for denizens, committed as they are to the view that only equal political representation through the principle of one person one vote can ward off domination and oppression. Seen from this perspective, majority rule could in fact constitute another form of tyranny - the tyranny of the enfranchised majority. The exclusion of disenfranchised minorities from consideration is therefore a serious gap.

Furthermore, even if we set aside this omission, the normative implications of the democratic-republican approach may be unappealing. Although Bellamy and other political constitutionalists assume that all residents are citizens, other theorists who consider the implications for transnational migration for democratic or republican principles have concluded that denizens are granted *too many* rights (Schuck 1989, Jacobson 1996). This is because disassociating citizenship from rights disincentives the acquisition of citizenship and means that there is no ‘value-added’ of citizenship. Thus (1996: 8-9) David Jacobson argues that transnational immigration ‘is steadily eroding the traditional basis of nation-state membership, namely citizenship’.

Although Bellamy does not explicitly discuss the implications of transnational migration for his democratic theory, aspects of his theory of citizenship indicate that it is not well equipped to respond to the problem of denizenship. As outlined above, it precludes the disaggregation of rights and membership. Moreover, it seems to rule out granting political rights on the basis of residence rather than citizenship – one proposal that is sometimes advocated in response to the problems faced by migrants. This is because participation and rights are dependent on ‘belonging’ - the shared identity and identification with one’s state of citizenship that are the necessary conditions for trust (Bellamy 2008b). On the other hand, in recent work Bellamy (1999: 198) does seem to be sensitive to the propensity to domination faced by migrants as he highlights the problem of forced or pressured migration: ‘The extent to which ethnic groups other than refugees chose to immigrate is debatable, since social and economic push factors usually operated to some degree or another’. This is in stark contrast to the view of it as a predominantly consensual or contractual affair characteristic of patriotic republican approaches to immigration as exemplified by the work of David Miller (2000, 2008a, 2008b). I will examine Miller’s theory in the next chapter.

There is therefore a fatal tension in the democratic-republican response to denizenship. On the one hand it identifies a vulnerability in denizens’ rights status, but on the other it criticises the expansion of rights to denizens and rules out political rights for denizens. In my view, the case of denizens undermines the democratic-republican case for the politicisation of rights, and reconstructing the democratic-republican position on denizens demonstrates that it is less compatible with the fact of

mass migration than the liberal-rights approach. Nonetheless, the democratic-republican insight that rights often *are* politicised, whatever we think *should* be the case, means that we cannot wholeheartedly accept the liberal-rights approach to denizenship. In the next section, I will examine the lessons that we can draw from this analysis by considering the two approaches together. I will argue that conceiving of denizenship as rights vulnerability is inherently misguided. Both the liberal-rights and democratic-republican positions are problematised by the fact that they attempt to *understand* the problem of denizenship in the same terms they would use to argue for the *improvement* of the status of denizens.

IV: Beyond Rights Vulnerability

I have argued that there are significant problems with both the liberal-rights and democratic-republican approaches to denizenship. The liberal-rights approach is susceptible to three different sorts of objection. The first is that, in practice, a commitment to rights on the basis of personhood in liberal democracies is often accompanied by practices which seek to undermine the eligibility of denizens as rights-holders. I granted that this is not an argument against the liberal rights framework, but an argument that, in actuality, the practices of liberal states are often unjust. Nonetheless, the objection still has some cogency because it questions the narrative which offers rights as a panacea to the problem of denizenship. The second set of objections will be more convincing to the liberal rights theorist, as it concerns the way in which the rights approach disregards the impact of immigration status over the enjoyment of rights. Even though the enjoyment of rights pertains to the non-ideal, it is a *necessary* kind of non-ideal. The third class of objections holds even in an ideal scenario, and concerns the necessary tension between policy-making understood as legitimately prioritising citizens, and rights which are said to protect everyone. If, as the democratic-republican approach contends, politics necessarily permeates rights-protection, then this is a problematic tension.

The liberal-rights approach therefore lacks an account of the way in which political power shapes the way that rights are determined, allocated resources, and balanced against one other. It also pays insufficient regard to the effective enjoyment of rights. The threat of deportation can prevent certain migrants from enjoying their legal rights, while the power of deportation and detention can be used to remove individuals from certain rights constituencies.

The democratic-republican argument is that rights are, and should be, politicised. The first, empirical, point raises problems for the liberal rights theorist, as set out above. However, it also raises problems for the democratic republican, to the extent that the normative implications of the democratic republican view are realised. This is because the democratic republican's commitment to strong democracy means that they would be inimical towards giving denizens the vote. But if denizens are excluded from the political process, their rights are likely to be better protected to the extent that rights are insulated from politics. I would like to suggest that the paradox at the heart of the

democratic-republican response to the problem of denizenship is the result of an insufficiently developed conception of non-domination. The apparent paradox is the result of a circular definition – by identifying non-domination with democracy, we are left with the tautological conclusion that lack of political rights is equivalent to domination. In Part 2 of my thesis I will argue that non-domination is indeed the correct principle to underpin a democratic theory of denizens, but that we should develop a more nuanced conception of domination.

Moreover, a similar problem arises with the liberal-rights approach, which demonstrates a deeper difficulty to understanding denizenship as rights vulnerability. If denizenship is defined as problematic to the extent to which it represents an imperfect codification of the moral rights of the human, then we cannot say under what conditions, if ever, lacking legal rights is problematic. This is a difficulty because of the intuitions we have about different types of visitors and migrants to the state. We consider it to be unproblematic for transients, and perhaps those who have recently arrived, to have fewer rights than citizens. An argument that denizenship is problematic if it represents rights vulnerability conceives of the problem as identical for all types of denizens, even those who have just arrived and intend to stay for a short period of time. It does not cohere with our intuitions about the additional moral claims raised by those who have lived in the country for decades. One straightforward response might be that denizenship is unproblematic if two conditions obtain, the first is that it provides adequate enjoyment of one's human rights, and second, that a denizen has the right to acquire citizenship on the basis of fair, minimal conditions. It is this argument that I will therefore turn to next.

Chapter 4 - Beyond Naturalisation: The Role of Citizenship Acquisition in Normative Approaches to Denizenship¹⁴

Immigration has generally been considered anomalous by political theorists, and thus the status of alienage or denizenship is seen as an atypical, temporary state. Perhaps because of this, the surge in political theorists' interest in immigrant issues has been significantly skewed towards the question of the conditions under which immigrants can become citizens. Any worries about the troublesome features of denizenship – such as political exclusion or limited welfare rights discussed in the last chapter – are swiftly assuaged so long as denizenship is not a permanent condition. This chapter will scrutinise the implicit and sometimes explicit assumption made by political philosophers that the status of denizenship is unproblematic provided non-citizens have fair means to depart from this status by becoming citizens. It will critically assess the responses to denizenship provided by three theories of citizenship acquisition. The first states that denizenship is problematic if it is permanent, in other words if there is no possibility of exiting the status by becoming a citizen. The second contends that denizenship is problematic if exit from it is unfair. The third considers denizenship to be problematic if exit from it is not automatic. My approach is therefore somewhat different to other recent explorations of citizenship acquisition, which tend to consider what conditions states can legitimately set on naturalisation and evaluate approach in of themselves, rather than in a wider context of normative approaches to denizenship.

My central argument is that fair citizenship acquisition alone cannot underpin a complete normative approach to denizenship. I make three claims to support this. First, our intuitions about the problem of denizenship are not just a function of how easy or difficult it is for denizens to leave the status of denizenship by becoming citizens, but also with how easy or difficult it is for denizens to leave the country. The theories examined here do not pay sufficient regard to these two ways to leave the condition of denizenship: naturalisation, or the acquisition of citizenship, and leaving the host country. In the next chapter I will determine the vulnerability of denizens to domination according to these two dimensions of exit. The status of long-term or permanent alienage is more problematic in the case of migrants who have high subjective exit costs of leaving the state, whether because they have established personal and professional ties, or because they have dismal opportunities elsewhere. Second, because citizenship acquisition requirements have a differential impact on different groups of migrants, the same conditions can make it more or less difficult for these different groups to leave the status of denizenship, and some may be effectively locked into the status. The obvious solution to this – automatic citizenship – is not a desirable alternative because the lives of migrants may be bound up elsewhere. Third, how significant these two problems are is dependent on an account of how

¹⁴ I borrow the phrase 'Beyond Naturalisation' from the title of an Institute for Public Policy Research report of the same name (Rutter et al. 2008).

troubling the status of denizenship is itself. Therefore, citizenship acquisition alone cannot tell us the conditions under which denizenship is problematic. In the next chapter, I will argue that the principle of exit costs identified here play a significant role in rendering denizens vulnerable to domination.

The chapter is structured as follows. In Part I, I examine the first response to denizenship, that it is unproblematic provided there an exit option, in other words the possibility of acquiring citizenship. In Part II, I examine the suggestion that exit needs not only to be possible, but also fair. In Part III, I critically assess the view that exit needs to be not only fair but also automatic. In Part IV, I draw conclusions about the approach to denizenship provided by the citizenship acquisition literature as a whole, and identify questions to guide the discussion in the second half of my thesis.

I: Exit from Denizenship

The process of citizenship acquisition for migrants has been subject to increased normative scrutiny in the last two decades (Van Gunsteren 1988, Honohan 2009, Pickus 1998, Bauböck 1994a, Carens 1989, Schuck 1989, Brubaker 1989a, Hampshire 2009, Seglow 2009, Carens 2002, 2005b). There are two significant motivations for this trend. First, increased immigration, as well as higher numbers of immigrants from countries seen as culturally different and less obviously assimilable, have led to a perceived “crisis of immigration” in many liberal democratic states (e.g. Mote 2003, Moxton 2006). Several European states have responded to anti-immigrant public sentiment by publicly wielding any power they have over aspects of immigration. Admission to citizenship, in that it constitutes administrative access to formal membership, is one of the areas where realities can be easily tailored to fit the government’s inclinations. This is in contrast to the less easily containable flows of people through state borders, where numbers are difficult to predict due to the obstacles presented by policing borders, the practice of overstaying visas, and the numbers of migrants from within the EU free movement area. Citizenship acquisition has been one high-profile way in which states can exercise and demonstrate their sovereignty and power over immigration. In recent years, most states in Europe have introduced citizenship tests and tightened the requirements for applying for citizenship. Philosophers are to some extent merely following these empirical trends; Rainer Bauböck (2009: 476) has remarked that political theory is ‘generally a latecomer’ on these sorts of concerns.

The other reason why citizenship acquisition is an area of interest for political theorists is the myriad of conceptual and normative problems it raises. As Phillip Cole (2009b: 5) observes, ‘[t]he existence of “resident aliens”, in whatever form they take, raises profound problems for liberal theory’ The first of these is a paradox of equality: if people are admitted to (or are de facto present in) the state but not granted full membership this seems to sanction and consolidate second-class citizenship. Addressing the problems of denizenship through the acquisition of citizenship is attractive to political theorists because it preserves traditional concepts of the relationship between the citizen and the state. Denizenship also raises a democratic problem: laws bind all those subject to the state, the populace,

but are made by democratic representatives in the name of the smaller group of 'the people', the demos. Addressing this democratic problem, Michael Walzer (1983: 59) likened permanent non-citizen residents to 'metics', and argued that this sort of two-tier membership constituted tyranny of citizens over non-citizens. Similarly, Benhabib (2004: 43-8) holds that immigration engenders a paradox of popular sovereignty because it results in people who are affected by the decisions of the demos being excluded from the demos. This fact undermines core democratic principles of self-legislation and self-constitution and creates 'subjects' who are not citizens. A model of fair access to citizenship, again, would alleviate these concerns and thus allow theorists to continue treating denizenship as an anomaly.

The democratic problem provides the impetus behind the first response to denizenship: that it is problematic if it is permanent. This is because concern about non-citizens being equivalent to metics only holds if they are permanent residents. It is not problematic that foreign students or holidaymakers lack the vote while they reside in this country. As Robert Goodin (2007: 42) describes, it is right that captains of foreign ships moored in our ports or temporary visitors are not included in the demos (Goodin also includes 'any alien illegally living among us', which I think is less controversial). Robert Dahl's (1991: 129) statement that the demos 'must include all adult members of the association except transients and persons proved to be mentally defective' draws similar lines between permanent and short-lived arrangements. The democratic principle therefore underpins Benhabib's (2004: 221) claim that we ought to give resident immigrants access to citizenship and political rights because of the principle that 'those subject to the laws also be their authors' (see also Raskin 1993: 1441-5). Of course, precisely what constitutes a 'transient', a 'resident', or 'permanence', is open to contestation.

Several immigration scholars have emphasised the wrongness of permanent alienage or denizenship, and not only from a democratic perspective. Benhabib (2004: 3-4) argues that '[p]ermanent alienage is not only incompatible with a liberal-democratic understanding of human community; it is also a violation of fundamental human rights'. Ruth Rubio-Marín (2000: 1 my emphasis) argues that '[t]he exclusion of non-national residents from the sphere of civic equality in spite of their *permanent* coexistence with nationals provokes concerns about the legitimacy of the public authority and the laws that shape their lives in an increasingly pervasive manner'. Jonathan Seglow (2009: 789 my emphasis) has written a recent paper on naturalisation which examines positions which each evoke 'a different moral intuition as to the wrongness of *permanent* alienage'. Linda Bosniak (2000: 975) has observed that this emphasis on permanence is predominant. 'The prevailing view, among those legal and political analysts who have addressed the issue, is that alienage does not offend the norm of universality so long as a person is assigned the status on a temporary basis'.

It is easy to see why the idea of permanent alienage is intuitively troubling. In the literature on hierarchies and inequalities, permanently occupying an inferior status is more worrying than temporarily doing so. This is because permanence implies being locked in a status or blocked from leaving it. Ian Shapiro (1999: 44) contends that it is ‘ossified’ hierarchies that we ought to worry about; those from which exit is impossible, such as caste systems or hierarchical orders. Hence we object to the second class status of women in patriarchal societies, but the status of children is seen as less morally troublesome because on reaching the age of majority children leave their status as children. From this perspective, denizenship is problematic if it is fixed or ‘ossified’, that is, more like women pre-enfranchisement than children. Bosniak (2006: 37) has described this dimension of permanent alienage as the ‘privileging of citizens over noncitizens’ which ‘would seem to depend on, and to reinforce, caste-like stratification among societal groups’.

Although intuitively appealing, determining exactly when and under what conditions denizenship becomes permanent and hence problematic is tricky. To take Benhabib’s (2004: 138) approach in more detail, her emphasis is on differentiating between the sort of attributes of denizens related to the ‘*kind of being you are, your ascriptive and non-elective attributes*’. Benhabib contends that the right to membership is the flipside of the right not to be denaturalised by one’s country of citizenship. It is a human right, and one which should be respected through non-discriminatory and accountable citizenship acquisition procedures (4). The rules on naturalisation should be publicly promulgated and transparent, and not applied with discretion or capriciousness (140). The right is grounded in discourse theory as it is unjustifiable to communicate to migrants that they should ‘remain a permanent stranger upon the land’ (140). Discourse theory also informs the division between legitimate and illegitimate criteria on which to judge eligibility for citizenship. Benhabib contends that to bar someone from membership on the basis of ascriptive criteria would be ‘reducing your capacity to exercise communicative freedom to those characteristics which were given to you by chance or accident and which you did not choose’ (139). Note that she permits considerable variation in the way in which this right to membership is realised in different countries, as it should be configured as the result of the deliberations of that particular democratic community. She permits considerable latitude for country-specific discretion in regard to length of residence and language competence, and allows that civic literacy, financial security and marketable skills may be acceptable criteria for membership.

The motivation behind this position is clear. If one of the requirements for naturalisation is that someone is white, or male, then those who are not are definitionally excluded. They are effectively stuck in the status of denizenship. But there seem to be three ways in which this intuitively sound approach to denizenship – that considers it unproblematic when not permanent – stumbles. First, on Benhabib’s own terms: if permanent denizenship is what we should worry about, then why does it make a difference whether it is a result of chosen, or ascriptive criteria? Second, should we not care

about the disproportionate impact on different groups of migrants that Benhabib permits? Third, drawing these two queries together, is an alternative hypothesis: that which makes denizenship unproblematic is not the route out of it, but the rights attached to the status itself. Only this aspect of Benhabib's argument – that rights should be accorded to humans independently of their membership – could effectively defeat the worry about the lack of exit option, as well as the different levels of accessibility to this exit option, of certain denizens.

The considerable leeway for states to determine their preferred requirements might mean that some groups of migrants are effectively confined to the status of denizenship. For example, permitting states to ask for a clean criminal record means that those convicted of crimes would be permanently locked in the status of denizenship. Benhabib does not explicitly mention criminal records, but she allows that states may ask for a certain skill level, which is clearly compatible with certain migrants being definitionally excluded. Her objection is to discriminating on the basis of 'morally arbitrary attributes' (see Chapter 2 for a discussion of these) rather than criteria which have been selected. In his commentary on Benhabib's book, Aleinikoff (2007: 427) puts it thus: 'Is it in fact accurate that denying one a place in the conversation on these grounds is any less dehumanizing than denying a place on ascriptive grounds? And are not the results of both kinds of exclusion likely to be severe?.' Indeed, it seems that whether or not denying someone a place constitutes a problem is dependent on an account of how harmful it is to occupy the status of denizenship, as I will argue shortly.

Even if certain attributes do not effectively enclose someone in the status of denizenship, they might make it considerably difficult to leave it. Different people are affected by different requirements at different speeds – Joseph Carens (2002: 109-11) observes that citizenship tests and language requirements tend to favour well educated migrants from liberal democracies. Furthermore, it does not seem to be a matter of choice that some migrants find it easier than others to learn languages or prepare for tests. Does this matter? Returning to the analogy of children and women suggests it does. Children become adults after a certain period of time elapsing, something that would affect each migrant equally; Benhabib's proposal is certainly not that the only requirement is that a certain period of time should elapse. The fundamental difference between denizens and children then, on this account, is that denizens become citizens at different times. This is equivalent to children coming of age at different times. Generally, even though children may develop maturity at different times, we do not recommend that they have the right to vote, get married, drink or drive a car at different ages.

One response might be that these concerns are allayed so long as denizenship does not denude migrants of fundamental rights. Benhabib (2004: 3) adopts such a two-pronged solution, in addition to the right to citizenship, every person should be entitled to rights on the basis of their humanity. She contends that we ought to acknowledge 'the right of every human being "to have rights," that is, to be

a *legal person*, entitled to certain inalienable rights, regardless of the status of their political membership.’ But there are two approaches: either it does not matter that some migrants find it easier than others to acquire citizenship - because the status of denizenship is not problematic - in which case ‘acquisition of citizenship’ is not the solution to denizenship, or it does matter, in which case we need to take seriously the concern that it will have a differential impact on different migrants. Benhabib’s suggestion is that citizenship is important as it accords political rights, whereas other rights are demanded by the status of denizenship. This takes us back to our initial dilemma: we need another account of under what conditions it is problematic to be disenfranchised in order to determine whether we should worry about different classes of denizens finding it harder to acquire citizenship.

This raises a different problem: is the value that citizenship adds appropriately conceived of as the right of political participation? Seglow (2009: 792-4) contends that constructing a case for the right to citizenship on the basis of the right of long-term members to political participation is susceptible to the charge that this is not, in fact, a case for citizenship, but for alien suffrage. Sarah Song (2009: 607) describes the dilemma facing the democratic theorist as a trade-off between ‘expanding the circle of citizenship to include resident noncitizens’ and ‘disaggregating the rights conventionally associated with citizenship from the legal status of citizenship and extending some of those rights, including voting rights, to resident noncitizens’.

In fact, this tension is not unique to the democratic approach. Evaluating the claims made by migrants to citizenship is only possible if one takes a position on the value that citizenship confers. This relationship between citizenship rights and the right to citizenship has received rather different treatment in the literature. At the more inclusive end of the scale, Carens (2005a) has argued that length of residence strengthens the claim of the non-citizen *both* to the rights of citizenship and citizenship rights. Other theorists have argued that in fact the legitimacy of restricting access to citizenship is increased to the extent that denizens have citizenship rights, in other words denizens have a strong (moral) claim to citizenship if they are accorded fewer of the (legal) rights of citizenship. In this vein, Aleinikoff (2007: 428-9) argues that Benhabib’s focus on the right to citizenship is misguided as it diverts attention from what he sees as the more normatively pressing issue of what rights flow from residence. By contrast, David Jacobson (1996) argues that it is precisely because so few rights are attached to citizenship, rather than permanent residency, that citizenship acquisition has been disincentivised and citizenship has become ‘devalued’.

The problem with evaluating theories of citizenship acquisition is that if we assume that citizenship confers additional benefits, that denizenship does not, then this begs the question: why not extend these benefits to denizens? On the other hand, if we assume that citizenship does not necessarily bring additional rights then this distorts the actual advantage that citizenship confers. The benefit of

taking this latter approach is that it enables theorists to examine the implications of excluding people from the status of citizenship itself. By disaggregating the claims to citizenship and to citizenship rights, Seglow (2009: 797) provides the insight that ‘withholding citizenship from those normally resident in society is a failure of respect’. Denying citizenship to those who have the moral right to the goods of citizenship ‘fails to recognise their status as interactive partners’ (798). However, this presents two problems. First, it is out of step with the practices of liberal democracies where acquiring citizenship is a precondition of access to the franchise. Second, it might be that the reason why it would seem disrespectful to deny migrants access to citizenship is precisely because denizenship is a lower status because in practice it confers fewer rights. There is a fine balance between isolating what is special about citizenship, and not misrepresenting the value that citizenship actually confers.

I will return to the trade-off between enhancing the status of denizenship, and facilitating access to citizenship, in Chapter 7. Because the aim of this chapter is to examine whether fair exit from denizenship in the form of the right to citizenship can provide an adequate response to the problem of denizenship, I will assume from this point onwards that the value that citizenship confers lies in the two significant benefits of citizenship that can be observed, almost universally, in liberal democratic states. These are the right not to be deported, the right of travel, re-entry and diplomatic protection, and the right to participate in national political elections. Nonetheless, I will discuss the implications for the package of rights attached to citizenship where relevant. In Chapter 7 I consider whether it is possible and desirable to separate the goods of citizenship from its formal status.

In the next section I will consider David Miller’s claim that citizenship rights should be understood as down payment on future citizenship. I will also examine whether his theory is susceptible to the same problems identified with the ‘exit from denizenship’ account. I first describe the core aspects of Miller’s theory of citizenship, second outline the quasi-contract that Miller recommends should underpin the naturalisation process, and third examine the implications for denizenship. I will then identify some limitations with Miller’s approach, and suggest some revisions.

II: Fair Exit from Denizenship

The second response to denizenship posits that it is unproblematic provided there is *fair* exit from it as a status. This is an influential view in that its central thesis – that denizenship is not problematic provided denizens are given adequate opportunity to acquire citizenship – is invoked whenever philosophers or politicians pose the question of what states can reasonably ask of would-be citizens. Miller’s theory of citizenship acquisition needs to be set in the context of his theory of nationality in order to appreciate the value that he places on citizenship. Nationalist approaches view citizenship as the formal reflection of a rich, collective, national identity and the source of reciprocal relationships including special rights and responsibilities. The citizen body should therefore correspond as far as possible to the national body, that is, people who share a national identity. This is because of the

social solidarity that flourishes in the presence of shared identity and its role in underpinning the demanding rights and duties of citizenship.

Miller's theory of nationalism revolves around three 'republican' principles. The first, central value is *patriotism*, in Miller's terminology: 'nationality'. Nationality is a shared identity based on belief in an imagined or real commonality that grounds special obligations. The nation has geographical and historical continuity – a physical territory or homeland and a tradition and history that evokes collective pride and shame in its members. Nationality is thus a central source of special obligation – manifested in duties to past, present and future members. Miller (2000: 23) contends that our ancestors have sacrificed for the nation and we therefore 'inherit an obligation to continue their work'. National identity also grounds Miller's second core principle of *virtue*. Citizenship is demanding, rewarding, and participatory, and requires citizens to be 'willing to take steps to defend the rights of other members of the community and protect its common interests' (2002: 58). Citizens may no longer be expected to perform military service, but should participate in civic or voluntary work, as well as participating in democracy in an other-regarding way that furthers the common good – by producing reasons for individual views which are potentially acceptable to all, and compromising and modifying preferences which are detrimental to the common good. Hence the third core value of *self-determination*. This combines the collective significance of the nation with the individual role of the citizens. The nation is 'active' and 'becomes what it is by the decisions it takes'. The historical community is on a certain unique trajectory influenced by the participation of individual citizens; it is self-determining. Citizens must see themselves as members so they can view the laws as in some way their own and not 'alien impositions' (2002: 58).

Citizenship is also demanding for the state. The principle of 'equal citizenship' requires 'that every adult member of the political community must enjoy equal rights and responsibilities' and it also 'places considerable demands on public policy' (2008a: 375). This means that, ideally, granting migrants the right to reside in the country means we expect them to become full citizens, with the associated extensive rights and obligations. Because of the principle of equal citizenship, second-class citizenship is undesirable: 'there are strong reasons for extending a single common citizenship to everyone who is subject to the authority of the same state' (2000: 73). German-style guestworker models would be wrong as 'it seems anomalous to have equal opportunity programmes that try to end direct or indirect discrimination on grounds of gender, race, ethnicity, etc. but not to extend these to cases of discrimination on grounds of nationality' (2000: 377).

It is therefore easy to see why citizenship is a good, in terms of the nationalist account. Citizenship alone provides the means to self-government. It is also the source of reciprocal capital, the ability to make claims on others. The impression given by this brief summary is that Miller is committed to a

fairly exclusive conception of citizenship. Citizens are those who share a national identity, who have a stake in the community including a sense of obligation to their ancestors and descendents, and who are willing to set aside their personal interests for the common good. New members are definitionally, as well as contingently, excluded from these criteria as members are not people 'who merely happen to have been thrown together in one place and forced to share a common fate' (2000: 25).

Despite this demanding model of citizenship, the demands set on new citizens are not objectionably onerous. In fact, we need not 'select as new members only those who already share the existing national identity', on the contrary, new members need only demonstrate 'a willingness to accept current political structures and to engage in dialogue' (2000: 130). The process of citizenship acquisition is therefore not a rubber stamp that confirms that assimilation is complete, but part of the process of adjusting to a new society. Nonetheless 'active steps must be taken to instil the ethos of citizenship in everyone who is formally admitted to that status' (2002: 89) including citizenship tests, language requirements and a willingness to 'accept the responsibilities of citizenship' (2008a: 381-5).

These steps are required as part of the quasi-contract approach to naturalisation. The immigration contract is propounded by Miller (2008a: 371) as a means of mediating between the interests of migrants in becoming citizens and of current citizens in accepting new members. He maintains that immigration should be approached 'by thinking of the relationship between the immigrant and the citizens and the receiving state as quasi-contractual'. The broad idea here is of a fair exchange where immigrants and the citizenry both compromise. Citizens will accept immigrants 'who play by the rules, demonstrate their commitment to the new society, and make contributions that are broadly commensurate with the benefits they receive' (2008b: 197).

The appeal to fairness is deeply appealing, and the idea of requiring both citizens and would-be citizens to adapt is fitting given Miller's emphasis on the reciprocal and altruistic dimensions of citizenship. But I want to suggest that this approach is problematised by the very conception of fairness it espouses – one of equal treatment. This means that it requires the same of all migrants, regardless of the sorts of claims that they raise. In particular, it takes no account of the opportunities that migrants have elsewhere and of the differential impact that naturalisation requirements will have on them. Furthermore, Miller's commitment to equal citizenship coupled with his writings on naturalisation commit him to an unappealing approach to temporary migration, which I will argue is untenable.

Although Miller acknowledges that we may wish to challenge the quasi-contractual approach on the basis that 'much immigration is not voluntary', he maintains that this consideration is outweighed by the fact that we are not asking what terms migrants would agree to in an original contract with the

state but where the balance should be struck in benefits and costs imposed and received by both parties. Miller (2008a: 372) continues: 'If an answer can be found, it will apply equally to a highly skilled professional who moves of her own volition in search of a better job or a higher wage, and to a refugee whose migration is driven by fear and has no chance to return safely to his country of origin'. I am not convinced that Miller takes his own claim about the non-voluntaristic character of immigration sufficiently seriously. The refugee example notwithstanding, Miller's language in describing the immigration process, alongside his contractual language of naturalisation, indicates that he generally thinks that migrants have freely signed up to immigration (and the implication is therefore that significant burdens can be placed on them). His writings on immigration portray it as a rite of passage: it apparently shows that 'you are made of the right stuff' and is a 'formative experience' that 'calls forth qualities of resourcefulness and mutual aid' (2000: 26). Miller thus idealises the extent to which immigration is chosen and consensual. In fact, in places, he describes immigration almost as a matter of personal preference or an expensive taste. Examining the relationship between an individual's attachment to her homeland and attitude to emigration, he says that some individuals would see exile 'as a personal tragedy, only to be contemplated in the most extreme circumstances' while others 'view the world as a kind of giant supermarket, where place of residence is to be decided by the particular basket of goods (jobs, amenities, climate, etc) available there' (2000: 13-4). It is as if determining how likely people are to migrate is a matter of placing them on a continuum of personal preferences with nationalists and homebodies on one side and cosmopolitan-libertarian citizenship shoppers on the other.

In addition, I have concerns about Miller's commitment to equal contract terms regardless of the particular situation of different denizens. He rejects the possibility that the refugee raises different claims because of her current status. Miller's comments on the refugee suggest that a migrant's reasons for migrating – compulsion, choice, preference, love, adventure, etc. – only have a bearing on their *entry* claims, not their claims to citizenship, where they enter a level playing field. However, in counting only the costs of the initial migration, Miller disregards the complex dimensions of contemporary migration patterns and the way in which different types of migrants relate to the state in different ways, even once they have lived there for some time. In my view, the cost of leaving the state – i.e. of 're-migration' or returning home – has a bearing on how problematic we consider it that they are a non-citizen of the state that they live in. From this perspective, the cost of leaving the country of residence is much higher for the refugee than the highly skilled professional in Miller's example. Leaving for the refugee can represent possible death or persecution, whereas the professional is likely to be able to get a visa and job and start a life elsewhere. Even for non-refugees, leaving and returning home may be prohibitively expensive, or simply not a viable option. It follows that the moral claims of someone who has no adequate opportunities elsewhere is stronger than

someone who has citizenship of, or potential residency in, a neighbouring state.¹⁵

Elsewhere Miller is, in fact, sensitive to individuals' different exit costs of leaving their place of residence, and the fact that this strengthens the need to improve the situation for those who cannot migrate. He expresses sympathy to the view that migration can privilege the well off and leave the disadvantaged with no choice but to withstand unfavourable circumstances. In earlier work (1995: 442), he maintains that a libertarian citizenship model would entrench the problem of 'white flight' as only the affluent can afford to leave their home whereas the poor generally do not have this luxury. Moreover, Miller's theory implies that it is neither *desirable* nor feasible for people simply to move on when it is their interests. 'Supermarket' style migration 'fails to address the question of what holds a country together' and tends to disadvantage certain groups: 'What then happens to minorities who for one reason or another are less well equipped to take advantage of the opportunities of the giant supermarket? Who has the responsibility to provide for them?' (2000: 178). Miller's theory supports the view that because of the differential costs of migration for different groups it is better to improve their current situation rather than just giving them the right of exit. If this is the case, then the reduced right of exit for refugees grounds a case to improve their life in their state of residence, in a way that it does not for a highly skilled migrant who can easily move somewhere else.

Miller's approach is also susceptible to the objection I raised in response to Benhabib's theory, that naturalisation requirements have a differential impact on different groups of migrants. This concern is particularly pronounced in this context as Miller explicitly advocates a blanket approach to different migrants through his contract model. His proposed criteria for citizenship, including language proficiency, citizenship tests, and commitment, are all likely to have differential impacts on different groups of migrants. Citizenship and language lessons may also be costly, and tests are more psychologically stressful for some people than others. Poorer migrants or those with limited education or literacy are again likely to be disproportionately affected by both the financial and effective cost. Miller does not mention dual citizenship, but his emphasis on strong citizenship suggests he might rule this out. Giving up citizenship of their home country might make naturalising elsewhere prohibitively costly for some groups.

The final contradiction in Miller's theory concerns eligibility for citizenship, and for citizenship rights. Someone might counter the objections above by positing that the obvious solution is to argue that the moral claim involved is not to citizenship, but to the rights of citizenship. Recall that this was the most plausible reconstruction of Benhabib's account as to why *de facto* permanence might be permissible. In fact, for Miller, this avenue is less accessible. Miller's contention is that 'citizenship

¹⁵ As time elapses, exit costs for all migrants increase. However the exit costs for the refugee start from a much higher baseline. In Chapters 5 and 6 I develop this conception of exit costs in much more detail.

rights' ought to be accorded to migrants only as down payment on their transition to full membership. Therefore, it is only those welcomed into the country as potential settlers, and who commit to be so, who are eligible for these rights. This allows Miller to make considerable room in his theory for temporary migrants granted short-term visas with limited packages of rights. Moreover, Miller (2005: 202-3) argues that a legitimate refugee policy may be more orientated towards temporary asylum rather than permanent membership. He maintains that the obligation to admit refugees 'need not involve treating them as long-term immigrants. They may be offered temporary sanctuary in states that are able to protect them, and then be asked to return to their original country of citizenship when the threat has passed'. Yet, consider how this is in conflict with his view that a guestworker policy is fundamentally wrong as it entrenches two-tier citizenship. Distinguishing so clearly between temporary and settler migrants does precisely that, and additionally, it disregards how a temporary migrant can advance to the status of permanent migrant.

Even more significantly, Miller's approach fails to take account of how individuals grow into a relationship with their state of residence in a way which they may not have intended, and the extent to which we consider their normative claims on their state of residence to increase the longer they have lived in a country. This is in direct contrast to Carens (2005a: 39) whose argument I will turn to next, who claims that the primary criterion for citizenship acquisition is length of residence: 'the longer one lives in society, the stronger one's interest in living there, and, at some point a threshold is passed that should entitle a person to the full protection of citizenship itself'. The longer migrants live in a state, the less likely they are to leave it, as they form attachments, have children born there, develop careers, and become members of the social, political and cultural spheres. Carens contends that even if someone is admitted as a temporary migrant, if their visa is renewed several times (even if there are periods of absence in between) this grounds a strong case for them to be admitted as members. This argument is strengthened, I believe, by the observation that people often make decisions about the place they live incrementally and subtly, and in conjunction with those around them including family members, friends, and the wider community. It is not that the atomist individual acting alone makes a one-off contract to buy into a relationship with the state. Things change: individuals revise their decisions, and attachments are formed. I raise this point to cast doubt on both voluntaristic aspects to Miller's theory: that temporary migrants inhabit a lower status (perhaps indefinitely) as they were admitted on certain grounds and have consented to it, and that access to citizenship should be on the basis of a 'quasi-contract'.

The 'incremental' picture of membership is not, in effect, incompatible with some of the elements of Miller's theory. Miller (2005: 202-3) contends that refugees may reasonably be offered temporary sanctuary and then asked to return to their original country of citizenship when the threat has passed'. But he also posits that if the situation becomes more permanent then 'they are owed something like

the chance to make a proper life for themselves'. Refugees are thereby exempt from the initial requirement to admit all long-term immigrants to full and equal citizenship: 'this does not apply to refugees who are admitted temporarily until it is safe to return to their country of origin, but it does apply to refugees as soon as it becomes clear that return is not a realistic option for them' (204). If Miller concedes that the terms of mutual understanding, which is the basis for a relationship between an immigrant and state, might change, then it suggests he is not completely unsympathetic to the idea of incremental membership.

Miller's commitment to republican citizenship further indicates that he may be amenable to the concept of incremental membership. In her exploration of a republican approach to citizenship acquisition, Iseult Honohan (2009: 99) points out that living, working, paying taxes and sending children to school is what constitutes 'sharing of a common future' and 'interdependence', precisely the values that Miller highlights in his theory of nationality. Honohan argues that the contribution of the republican approach is its principle of having a 'stake', in contrast to a liberal or voluntaristic approach where citizenship is based primarily on choice. There is shared ground between Miller's theory of nationality and this republican approach, as Miller's theory aims to start from the ethical realism of the way in which we acknowledge and scrutinise existing attachments rather than theorise our connections with others as universalist, atomist individuals. Moreover, the republican concept of stake synthesises some of the observations I made in relation to the tensions in Miller's theory. Specifically, the principle of 'stake' allows us to see why a refugee ought to be treated differently from a highly skilled migrant from an EU state. The refugee has no other alternative state that she can go to, so her life is fundamentally bound up in her host state. The contractual principles under which she entered, even if it was made clear that refuge would only be temporary, cannot change this.

Miller's nationalist theory would therefore benefit from downplaying its voluntaristic elements in favour of a richer concept of 'stake'. Honohan suggests that length of residence is a good proxy for this, however in my refugee example I demonstrated that someone need not have lived in a country for long in order to have a stake there. We need therefore to consider what further constitutes having a stake. Furthermore, the question of why it is harmful to live in a country and have a high stake there without having citizenship has still not been answered. Although there seem to be compelling links between the republican concept of citizenship and having a stake in a country, the reasons why citizenship should be a good for such individuals has not been sufficiently explored. These questions will be taken up in the second half of my thesis. In the next section, I seek to test the citizenship acquisition approach in one final way: by examining whether eliminating any requirements beyond the passage of time can circumvent the problems identified in the first and second sections of this chapter. I argue that it does, but that it generates new problems as automatic citizenship takes insufficient account of stake - the extent to which someone's interests are bound up in their state of

residence – and external citizenship – how someone's interests are protected by their state of origin. I hope to show that those who would have us believe that access to citizenship can solve the problem of denizenship are on the horns of a dilemma. Either they advocate requirements on naturalisation which might effectively lock some migrants in the status of denizenship, or else make it considerably harder for some than others to naturalise, or they advocate no requirements except period of residence, which seems too generous in some respects, illiberal in other respects, and takes insufficient account of how different migrants make different claims based on their various needs.

III: Automatic Exit from Denizenship

The third response to denizenship contends that migrants' claims to citizenship are completely independent of their attitudes, attributes or inclinations. This approach is sensitive to the concern that conditions set by states may inadvertently disadvantage certain groups by making the only condition period of residence. In addition, it recommends that citizenship rights are accorded independently of citizenship. Exemplifying this approach, Carens' theory is many ways diametrically opposite to Miller's. He considers length of residence alone to ground a right to citizenship, thereby discounting the terms under which migrants were accepted, including whether they were legally admitted to the state at all, and the extent to which they are committed to, or integrated into, their community of residence. There are, however, some commonalities between the two theories. In the last section, I argued that Miller's non-voluntaristic conception of citizenship (as opposed to his voluntaristic conception of immigration) is in fact compatible with the idea that migrants 'grow into' citizenship, Carens' central principle. A revised version of Miller's account would therefore not be so far from Carens'. The principle of residence, for Carens (1989: 212-3 my emphasis), is that 'anyone born and brought up within the borders of the modern state is morally entitled to citizenship in that state' and similarly 'for those not born and raised in a state, *the longer one's residence*, the stronger one's moral claim to belong and hence *one's moral claim to citizenship*'. Carens (2005a) supports this argument with his claim that people who have lived in a state for a certain period of time are *social members*, hence citizenship is the formalisation of already established membership. Their lives 'intertwine with those of others' such that migrants 'form connections and attachments that make them members of that society'.

Whatever requirements can reasonably be set on citizenship acquisition after a few years, these become illegitimate after a certain period of time has passed: 'After an initial residence of some years, they ought to be admitted to citizenship with at most the satisfaction of a few modest requirements regarding language and knowledge of the country's history and institutions. As more years pass, even these modest requirements should be dropped. At no time should they be required to renounce previous citizenship to acquire a new one' (2008a: 17-8). In addition, this process should be *automatic* after a certain period of time has passed, as Carens (2005b) has clarified in his more recent work.

That a certain period of residence is a sufficient condition for citizenship means that naturalisation is more like children reaching the age of majority than someone having to prove themselves as an eligible member. The claim to citizenship is independent of migrants' capacity for good citizenship, inclination to participate or enter dialogue with fellow citizens, or loyalty to their state of citizenship, just as children are granted rights on reaching a certain age regardless of whether they have in fact reached the requisite level of maturity. This deals with the objections I raised in relation to both Benhabib and Miller – that their accounts could leave some denizens locked in the status of denizenship, and that it might be harder for some than others to leave the status.

Another significant dimension of Carens' theory is his idea of the harm inherent in deportation. Carens uses deportation as a thought experiment to demonstrate that our moral intuitions support the principle of length of residence. Carens (2002: 202) contends that the deportation of long-term residents to countries 'where they know no one and sometimes whose local language they do not speak' is 'a scandal, the most blatant and severe injustice against non-citizens in any of the practices I shall criticise'. He asks what our response would be if Germany were to expel the hundreds of thousands of people born and raised in Germany by Turkish or Yugoslav or other immigrant parents and says that his 'own reaction is that such expulsion would be morally reprehensible'. This is because people have a 'vital human interest in being able to continue to live in the community in which they were born and raised' (214). Carens then asks us to consider whether we have the same reaction to the deportation of long-term residents, first those who have been in the country since childhood, and then those who have been in the host state for less time. His point is that the harm constituted by deportation *increases with residence*. For those who are born in the host state it is particularly harmful. It is almost as harmful to those who have been resident since childhood. Length of residence, and the harm that deportation would cause, are correlated. In addition Carens highlights the fact that deportation can cause further harm to the family and friends of the deportee. Once a non-citizen has lived in a state for a certain amount of time being deported would constitute the same degree of harm as expulsion of a citizen, and that stripping someone of citizenship or withholding it from a non-citizen are also symmetrical.

This is a significant contribution to our understanding of the conditions under which denizenship is problematic: first, when denizenship constitutes liability to deportation (which I have assumed, for the purposes of this chapter) and second, when someone has been resident for a sufficient length of time that deportation would constitute a significant harm. However, it seems to me self-evident that length of residence cannot be the only criterion relevant to this level of harm caused. Consider the principle of 'non-refoulement' in international law which requires that individuals are not deported to their home country if there is a significant risk that they will be persecuted, tortured or killed. In normative terms, the harm of deportation for a refugee is clear – it would be much more harmful for someone

to be deported if they ran the risk of being killed than if they were being sent back to a peaceful country where they had a pleasant viable alternative. To return to Miller's distinction between the highly skilled migrant and the refugee, the difference from a deportation perspective is that deportation would constitute a different degree of harm for these two individuals. A highly skilled migrant has a considerable set of employment options elsewhere, including, probably, eligibility to migrate to other countries.

I want to suggest that we should conceptualise these intuitions in terms of exit costs. Carens' intention behind the idea of deportation is surely to demonstrate that leaving would be costlier for those who have lived here longer. But once we acknowledge this principle, then we must widen it to consider what other factors contribute to exit costs. They are likely to be subjective, as different people's attitudes to migration differ, as Miller observed. However, factors that are likely to have a bearing include financial status, national origin, family and social ties, as well as issues such as special health requirements – for example the deportation of HIV positive immigrants to a country without free health care would be significantly costly. As Rubio-Marín (2000: 22) points out, residence is only an *approximation* for 'attachments and interests': 'Probably only one thing is clear: the urgency of the case for full inclusion varies directly with the strength of social ties and thus, normally, with the length of residence'. But to the extent that we can easily determine other factors that will influence exit costs, I will contend that we should take these into account rather than rely on residence as an approximator. In the following three chapters, I will expand on this intuition in more detail.

Accepting a more sophisticated conception of exit costs in turn informs the question of coercion. In Chapter 2, I examined the coercion account of citizen priority, the view that the subjection of citizens to the coercive apparatus of the state justifies special rights for citizens. I suggested that the coercion account was problematised by the fact that many resident non-citizens were similarly susceptible to taxation, legal coercion or execution, the features of 'citizenship' Blake highlights. I said that citizenship is not a necessary or sufficient condition of subjection, and therefore more needed to be done to consider what made someone 'relevantly' subject. That their exit costs are sufficiently high determines a plausible alternative.

Moreover, a more sophisticated conception of exit costs would connect Carens' earlier arguments with his later work on naturalisation. In his early work, Carens (1989: 214) evoked the problem of coercion when he argued that after a certain period of time migrants ought to be able to 'participate in political life, on the familiar liberal democratic principle that people should not be governed without their consent.' This is a version of the democratic principle I examined in Part I, that the coercive power of the law can only be justified if all those who are subject to it have some role in shaping it. An objection to the coercion argument outlined by Seglow (2009: 793) maintains that migrants can

be said to have chosen to enter the host country and therefore 'it would seem churlish for a newly arrived migrant to complain about high tax rates in his or her new home'. But if coercion becomes problematic only when someone's exit is sufficiently costly – for Carens, once sufficient time has passed – then this explains why the initial 'choice' is insufficient in legitimising coercion. Thus the problem of coercion only seems to arise after a certain period of time has elapsed. Carens' argument is that the longer you have lived in a country, the more your interests will be bound up there. This is compatible with the modified principle of democratic legitimacy put forward by Dahl that I outlined earlier – that all those subject to the law ought to be enfranchised, apart from transients. Carens sees those who have newly arrived as akin to transients.

I have suggested that Carens' principle of the harm of deportation provides us with a more substantial answer to the question of when denizenship is problematic. It is clearly also helpful in clarifying the vague distinction between transients and members common to the democratic theory literature which remarks on the problem of the disenfranchisement of non-citizens. But as I suggested, Carens wrongly assumes that the harm of deportation is correlated to the migrant's length of residence. Sometimes – in the case of vulnerable migrants like refugees – deportation is harmful from the offset. But there is another way in which the assumption of correlation is wrong. This is that sometimes even migrants who have lived in the country for decades have very low exit costs of leaving. They may have family, friends, property and so on elsewhere, and be planning their retirement in their home country. Or they may have skills that are in demand worldwide so that if they had to leave the country they could easily do so. Furthermore, Carens' theory takes no account of the citizenship migrants may hold elsewhere.

Bauböck (2007: 2395) has described this as 'external citizenship', the citizenship/s that immigrants have elsewhere. Bauböck observes that, 'unless they are stateless, denizens are at the same time foreign nationals who enjoy external citizenship status and rights in another country'. Taking voting rights as an example of how external citizenship changes our intuitions about migrants, Bauböck contends that we need to consider specific contexts of external citizenship in which the case for electoral rights might become weaker or stronger. The issue with framing the problem of coercion in Carens' terms, or as democratic legitimacy as outlined in Part I, is that denizens who come from liberal democracies are likely to have their interests adequately represented elsewhere, so they raise less of a moral problem than those who lack voting rights elsewhere. The principle of residence therefore only goes some way towards explaining our intuitions about the problem of coercion for long-term residents.

External citizenship further demonstrates why automatic citizenship is not desirable. It might be that certain migrants have no interest in acquiring citizenship of their host state because they intend to

return home, or because they simply do not feel sufficiently affiliated with it. The question of how migrants should be treated if they choose not to acquire citizenship has not yet been answered. We therefore still lack a full account of the conditions under which denizenship is problematic.

IV: The Role of Citizenship Acquisition in Normative Theories of Immigration

The three theories I have assessed in this chapter give us different but not radically different answers to the question of the conditions under which denizenship is problematic. Benhabib's answer is that denizenship is problematic if it is permanent. Miller's theory would likely say that denizenship is problematic if two conditions obtain, first the migrant was admitted on the understanding that they would become a permanent resident (rather than as a temporary resident), and second if they are not given fair access to citizenship through the quasi-contractual model of examining what both citizens and migrants can be expected to give up in the process of naturalisation. Carens' theory on the other hand would say that denizenship is problematic if social members, that is, immigrants who have lived in the state for a certain period of time (he says the threshold is five years, but admits it might be relatively arbitrary) are not given citizenship as a matter of course.

I have identified limitations with all three accounts. I suggested that Benhabib's theory is problematised by the fact that some migrants might effectively be locked in denizenship even if they followed Benhabib's recommendations for a naturalisation policy. I also argued that her theory gives insufficient attention to the differential impact of naturalisation requirements on different migrants, and whether or not this is a problem. My further observation was that how strong the objection is to these other concerns is dependent on how problematic the state of denizenship is in itself. Turning to Miller's account, I identified limitations with the idea that different migrants have the same claim to citizenship, regardless of their potential opportunities elsewhere. Again, whether or not this is problematic is in part dependent on how troubling the status of denizenship is. Finally, I evaluated Carens' theory of automatic citizenship, suggesting that unlike the others it takes seriously the problem of the differential impact of naturalisation requirements on migrants. I also suggested that Carens' principle of the harm of deportation informed our intuitions about the conditions under which denizenship was problematic. However, I suggested that Carens had not sufficiently developed the different reasons why deportation might be harmful, and indicated that this might be provided by a conception of exit costs.

I therefore have one main conclusion, and several areas for further exploration, with which to end this chapter. My conclusion is that the citizenship acquisition alone cannot tell us the conditions under which denizenship is problematic. This is because it takes insufficient account of the moral claims raised by different groups of migrants, and it requires that we have a conception of how problematic denizenship is in order to evaluate whether and how these different claims matter. In spite of this, the critical assessment of the two models of citizenship acquisition undertaken in this paper has provided

some of the foundations for a more sophisticated theory of denizenship which I hope to develop in Part II. The first of these is stake, the second is coercion, and the third is the harm of deportation. All of these have been shown to have an ability to guide us in understanding the exit costs of an individual in leaving the state and how these influence other moral concerns such as the coercion/subjection problem. One aspect of Carens' theory which I have not explored here, but which might be significant, is the role of the *threat* of deportation. Carens uses deportation predominantly as an illustrative tool to demonstrate under what conditions it would be wrong to deny access to citizenship, because citizenship alone guarantees the right not to be deported. But in fact, the *threat* of deportation seems to do considerable harm in itself. As many commentators have pointed out, those who lack, or are unsure of, their immigration status experience a 'chilling effect' in relation to their rights due to the shadow of deportation that hangs over them (Bosniak 2010, Gibney 2000, Rubio-Marín 2000). In the next chapter I will examine what influence the role of immigration status has over the enjoyment of rights, as well as developing the intuitions I have identified here concerning coercion, deportation and stake.

Part 2: A Domination-Reducing Approach to Denizenship

Chapter 5 - Domination as Dependence on Unaccountable Power

In the republican tradition, citizens are the paradigm of freedom and slaves the paradigm of domination, freedom's antonym. To be free was to be a citizen of a free state, and the rallying cry against tyranny was 'no taxation without representation'. Freedom was thought to be 'equivalent to citizenship' (Pettit 1997: vii). Does that make five per cent of the UK's population – the noncitizen population - slaves?¹⁶ The aim of the following three chapters is to establish whether citizenship is a necessary condition for the enjoyment of non-domination. Specifically, I intend to establish whether resident noncitizens or 'denizens' are vulnerable to domination, and if so, to develop a normative account of how to mitigate this vulnerability. In other words I wish to determine how to secure non-domination (even) in the absence of formal citizenship. This chapter conducts the preliminary task of developing a theory of domination which, it is hoped, will stand independently of the case of resident non-citizens. The subsequent chapter will consider the extent to which resident non-citizens, and different groups of migrants, are vulnerable to domination. The final chapter of my thesis will make the case for promoting the non-domination of denizens, and then recommend policies which would do so. A secondary aim of these three chapters is to test the coherence of a republican response to the scope and character of contemporary migration, which will contribute to the wider evaluation of the 'republican revival' being undertaken by several contemporary political theorists.

In this chapter I evaluate three main theories of domination, suggest some potential modifications to them, and set out my refined conception of domination. In the first section of the chapter, I present some preliminary reasons why domination may be a rich idea to mine for a new theoretical approach to denizenship. Then I set aside the case study of denizens in order to analyse the theory of domination. To begin with I examine the theory of domination as 'inhibited participation', concentrating on the writings of James Bohman. Then I explicate and build on the 'subjection to capacity of arbitrary interference' theory of Philip Pettit. In the fourth section I evaluate Frank Lovett's contribution to domination theory; 'dependence on arbitrary power'. Finally, I set out my own concept of domination as 'dependence on unaccountable power'. I argue for a modification of the concept of arbitrariness which distinguishes between its use as a substantive, evaluative standard, and as a procedural measure of checks, and propose the use of the term 'accountability' for the latter application. I also suggest that we can only ever speak of '*vulnerability* to domination' due to the epistemic obstacles to determining the exercise costs of interference of potential dominators and the exit costs of potential dominatees.

¹⁶ 4.7 per cent of the population of the UK were non-nationals in 2004, the last year for which statistics are available (Eurostat 2006).

I: Why Domination?

In the first part of my thesis I argued that the rights and citizenship acquisition approaches to denizenship were flawed by their lack of sensitivity to the influence political power has over the enjoyment of rights, and to the vulnerabilities experienced by different groups of migrants. Therefore, *prima facie*, a domination-inspired theory commends itself as an alternative model since domination can be ‘summed up... in one word: power’ (Pettit 1997: 298) and because it aims to identify the harm suffered by vulnerable groups. Domination lends itself to a ‘bottom-up’ approach to specific harms because it allows us to ‘exploit an asymmetry... in our moral intuitions with respect to the good and the just on the one hand and the evil and unjust on the other’ (Lovett 2010: 9). Examples of domination include most prominently, slavery, but also ‘wage slavery’ (Sandel 1996), feudalism, the domination of women in patriarchal societies, totalitarian dictatorships (Lovett 2010), and any ‘condition of political subjection’ (Skinner 1997: 69).

The sort of power that troubles domination theorists is ruling power or mastery. Someone can be described as dominated if they are subject to power which curtails their freedom to the extent that all that they do is at the mercy of the power-bearer, whether the power-bearer is a group, state or individual. In most formulations, the sort of power we should worry about is ‘arbitrary’ power – defined as power that can be exercised with impunity, with no regard to the interests of the subject, or power that is unrestrained. The epitome of domination in literature ranging from Roman classical texts to modern feminist discourse is therefore slavery. If you are a slave, all that you do is at the discretion or goodwill of your master. Correspondingly, freedom as non-domination is the state of not being under anyone else’s rule or mastery. To achieve such a state requires resilient immunity from interference (except the sort of interference that is non-arbitrary) not just contingent absence of interference. Thus domination, or more accurately, *non-domination*, is a theory of freedom.

Domination and immigration theorists therefore share common ground due to their mutual preoccupation with status and the way in which it influences the enjoyment of important freedoms. Non-domination is often identified with and described as equivalent to citizenship, as captured in the classic republican adage ‘to be free is to be a citizen of a free state’. Citizenship is a status of mutually acknowledged equality, autonomy and reciprocal power. This is exemplified by the ability to look your fellow citizens in the eye and plan your life in the assurance that the state power you are subject to will not be abused and that the power of your fellow citizens over you will be monitored and checked by legal constraints (Pettit 1996). Non-domination thus entails being ‘a person in your own legal and social right’ (Pettit 1997: 71). Domination theorists are therefore implicitly sensitive to second-class status which, analytically, the status of denizenship can be described as. Moreover, the fear and uncertainty associated with liability to deportation and short-term visas resonates with the description of the dominated as a psychological state which alters behaviour, consolidates ‘adaptive preferences’

(where people modify their desires to respond to the likelihood they will be fulfilled), and impedes self-respect.

Although denizens present a unique opportunity to test the parameters of republicanism and the theory of freedom as non-domination, analyses of domination which construct ideal-types of citizenship as freedom have been questioned. First, they have prompted concerns about the surreptitious importing of normative prescriptions at the point of conceptual analysis.¹⁷ Second, they can obscure the functional potential of domination in identifying scenarios which fall somewhere in between the two extremes.¹⁸ In addition, the use of the word ‘domination’ is disparaged for being pervasively and imprecisely conceptually applied to a myriad of situations which raise moral concerns (Lovett 2001). To avoid such methodological problems it will be necessary to identify a conception of domination first and establish where resident non-citizens fit in second, rather than designing it around the conceptual challenges raised by them. Therefore, this chapter will set my case study aside and examine three influential theories of domination on their own merits, beginning with the domination as ‘inhibited participation’ approach.

II: Domination as ‘Inhibited Participation’

Like other domination theorists, theorists of domination as ‘inhibited participation’ are concerned with mastering power. But these theorists focus on a specific dimension of this. They define an agent of domination as one who has the capacity to dictate the terms of a relationship, including imposing obligations on fellow members without giving them a say. This view is evident in the definition of domination given by Iris Marion Young (1990: 38) when she says that ‘people live within structures of domination if other persons or groups can determine without reciprocation the structures of their actions’ In a similar vein, Bohman (2007: 9) describes domination as ‘rule by another, who is able to prescribe the terms of cooperation. Thus the core idea of domination as having no control is substantiated by these theorists as no control over the very terms of the relationship. As Young’s use of the term ‘domination’ is embedded in a wider account of oppression, hierarchy and hegemony, I will focus on Bohman’s theory here.

Bohman’s theory of domination is developed in response to the context of the new global order and the non-consensual inclusion of agents within it. In Bohman’s (2004: 340) view, the modern face of domination is the enforced participation of people in the global economic scheme and the imposition

¹⁷ For various versions of the ‘smuggling’ complaint, see (Carter 2008, McMahon 2005, Lovett 2010)

¹⁸ This is not to suggest that domination theorists do not emphasise that components of domination vary in strength. My complaint is not that domination does not admit of degrees, like the objection raised by Paley (1825: 356), but that it is often described as if it does. In fact, Pettit specifically identifies three ways in which domination comes in degrees: greater or less capacity to interfere, capacity to interfere more or less arbitrarily, and capacity to interfere in a larger or smaller class of choices or in choices that are of greater or lesser importance (Pettit 1997: 94).

of obligations on them which they have no capacity to influence. The 'circumstances of global politics' creates the problem of 'nonvoluntary inclusion in indefinite cooperative schemes' which is a 'form of domination'. A key example of this is the trend towards 'juridification', the permeation of law into previously democratic institutions, the delegation of powers to legal rather than democratic agents and the expansion of adjudication into spheres previously characterised by egalitarian relationships between citizens (2005: 111). Bohman (2005: 106) argues that non-domination requires the 'capacity to begin', against which citizenship appears as the paradigm of freedom. Only a citizen has 'the ability to initiate deliberation' which entails 'the ability not just to respond, but also to set the items on an agenda and thus be secure in their freedom from domination'.

The context-specific character of Bohman's definition of domination renders him susceptible to the charge that he is tailoring his theory to fit a particular scenario. For one thing his main task in recent articles and his main book on republicanism and democracy is to 'redefine democracy' which means that democracy is the concept he seeks to develop, not domination (e.g. Bohman 2007). Second, he defines freedom as non-domination in democratic terms and prior to developing a conception of domination. He contends that he is developing an account of 'freedom from domination operationalized in a very specific sense: employing Hannah Arendt's conception of freedom as 'the capacity to begin' or the 'capability to initiate deliberation and thus participate in democratic decision-making processes' (Bohman 2005: 102). Third, he develops a conception of domination, and thereby rejects Pettit's definition, in response to particular case studies and contexts. Bohman (2007: 8) maintains that the paradigm dominated are 'not slaves, but rather rightless persons who lack even the right to have rights', or 'stateless persons', and that Pettit's definition of domination 'confuses the ancient problem of tyranny with the problem of modern domination' and should be supplanted by a conception of domination appropriate for 'the transnational context' (8).

These methods are problematic for several reasons. Lovett (2010) raises the 'prescription-in-definition' objection which states that an account of domination should separate the descriptive account of the conditions under which domination exists and the normative account of what should be done about this. Otherwise concepts of domination have a tendency to collapse into circularity, as in the case of Shapiro's claim that deliberative institutions should be judged according to their efficacy in reducing domination. Shapiro defines domination as the 'illegitimate exercise of power', in other words, the sort of imbalances of power that should be reduced, so 'deliberative institutions ought to be judged according to their efficacy in reducing the sorts of imbalances of power that we ought to reduce' (Lovett 2010: 19). Lovett further contends that to define domination and democracy as opposites renders the connection between them analytic which undermines domination's credentials for underpinning the case for democracy. Moreover, it obscures our understanding of domination to define it in reference to another, equally complex concept (117).

A further problem can be termed the ‘all-or-nothing’ problem. This is that it undermines the potential of domination to admit of degrees, or, as Lovett puts it, its ‘descriptive contouring’ – its capacity to make ‘clear statements about the comparative levels of domination when one scenario is contrasted with another’ (95). This is a long-standing charge against liberty as non-domination; William Paley (1825: 356) argued in the nineteenth century that it does not admit of degrees as descriptions of the freedom of free or enslaved peoples ‘are intelligible only in a comparative sense’. This objection matters because if people could only be dominated or non-dominated this would diminish its potential as an ideal to inspire public policies, as there would be no motivation to improve things beyond a certain threshold. In this case, that non-domination requires the ‘capacity to begin’ can be seen as at once too demanding and too easily achieved. It suggests that democracy is a necessary requirement of non-domination but also a sufficient requirement.

However, all these issues could be overcome provided it were possible to reconstruct Bohman’s theory of domination without pre-empting either a conception of democracy or non-domination. The most plausible candidate for such a reconstruction is Bohman’s discussion of where he departs from Pettit in a recent book chapter. Here, Bohman (2008: 198) argues that one agent dominates another if they have 1) ‘the ability to impose obligations and duties on others’, 2) ‘without recourse or remedy for the dominated person’. This second component might anticipate democracy, but it does not definitionally require it, as ‘recourse or remedy’ could take any number of forms. Although at times Bohman (2009) has maintained that the only valid institutional controls that render power legitimate are democratic ones, more recently he has acknowledged the role of legal institutions as channels of appeal. In this later work, Bohman suggests that a necessary condition for recourse or remedy is not that institutions are participatory, but that they provide *self-initiated* instruments for challenging individual circumstances. This broader definition of recourse or remedy may go some way to circumventing the problems outlined above. In relation to the prescription-in-definition objection, Bohman is anticipating the sort of institutional framework which his descriptive account requires, but not specifically setting down exactly what it would look like. In response to the all-or-nothing problem we can say that on this revised account there are multiple ways in which individuals could seek recourse or remedy which are more or less available to people.

However, the requirement for recourse or remedy to be self-directed raises two further concerns; that Bohman’s theory is too demanding, and that it is insufficiently demanding, in the situations it would identify as domination. Must this recourse or remedy be open to those affected themselves, or could they have some delegate appointed to take action on their behalf? Should the same channels be open to everyone or do, for example, children have less of a claim on them? Are these channels a threshold concept, whereby once they have been met there is no decrease in domination? This latter question

raises the most urgent problems if it implies that the condition of recourse or remedy being fulfilled renders legitimate the power to impose obligations and duties on others. If so, it seems a rather weak condition. People may be wrong about what is in their interests, they may have adaptive preferences, or they may have insufficient awareness of what they are being called upon to do. As Lovett (2001) points out, the implication of the inhibited participation approach is that it implies it is the consensuality of a relationship that renders it legitimate.

A related concern is that if someone has to personally hold power to account this might disadvantage those who lack the resources to speak for themselves. Bohman does not consider what would constitute non-domination for those disinclined or unable to participate. Instead, he might contend that the mere capacity to hold power-holders to account will be enough to influence the power-holders to hold off certain harmful behaviour. But again, this seems rather too easily achieved. My sense is that there is another dimension to the harm evoked when we describe someone as dominated. It is not just that they are unable to contest the boundaries of their situation, but that the situation itself raises normative concerns. Furthermore, the theory also seems overdemanding in some other respects as Bohman lacks an account of the sort of situations which particularly necessitate recourse or remedy. If a sufficient condition for a claim to recourse or remedy is the presence of a duty, and any duty, this would be extremely onerous.

Taken together, these problems suggest that Bohman's theory cannot provide an adequate basis for my concept of domination. A theory tailored to the problem of migration and the absence of citizenship must be ruled out for my purposes, as I wish to examine whether resident non-citizens, and certain sub-groups of them, are susceptible to domination, rather than beg the question of their domination. Nevertheless, there does seem to be a strong link between the idea of domination as we use it in ordinary speech and intuit its existence, and the lack of ability to refute, complain or appeal. This will be revisited throughout the remainder of this paper in the context of other theories of domination.

III: Domination as "Subjection to Capacity for Arbitrary Interference"

Proponents of domination as subjection to capacity for arbitrary interference, or "arbitrary power" for short, think that freedom is constrained by exposure to the potential for harm. For example Quentin Skinner (1997: 69-70) argues that freedom requires that you avoid 'a condition of political subjection or dependence, thereby leaving yourself open to the danger of being forcibly or coercively deprived by your government of your life, liberty or estates'. The epitome of unfreedom, for these theorists, is slavery: the most vivid example of living at the arbitrary will of another. Being subject to someone's arbitrary will means that all that you do needs to be approved or sanctioned by them; privileges can be granted and withdrawn on a whim. Like theorists of freedom as non-interference, these philosophers consider interference generally to impede freedom. However they diverge from this school of thought

in two significant ways. First, they maintain that in many instances the interference need not actually occur in order to limit someone's freedom, it is the mere fact that it could occur. The power of interference is what constitutes the impediment to freedom, regardless of what happens in actuality. Second, they do not conceive of interference as intrinsically bad, provided its perpetration fulfils certain requirements.

To take the first difference from non-interference theorists in more detail, freedom as non-domination can be seen as more demanding or radical in the situations it identifies as freedom-reducing. It does not restrict itself to locating instances of observable interference such as a specific action by a specific actor, but looks behind this to consider how power relations can impact upon the sphere of opportunity of those affected. The paradigm example here is of a slave with a benign or lazy master. The absence of direct interference does not render the slave unfree as she is still dependent on her master's discretion or goodwill for all that she does. Her master may allow her to take regular breaks or have lunch with the slaves from next door but she does so at her master's discretion, and at any point he could decide to terminate these privileges. Moreover, it is likely that the presence of the power relation will have the effect of conditioning the slave's action. She gets to know him and his behaviours and as a consequence she modifies her behaviour so it conforms to what he seems to want in order that he interferes with her less. It seems counterintuitive to describe her as correspondingly 'more free' (Lovett 2006).

The second distinction is also appealing in its compatibility with some of our central intuitions about law and governance. It makes little sense, the argument goes, to conceive of law as perpetually freedom-limiting; laws against violence for example promote freedom by providing me with security against the interference of others (Laborde and Maynor 2008: 8). Legislation, taxation and so on are not necessary evils or instances of prioritising more important liberties over lesser ones, as in the traditional Rawlsian solution, but are freedom-promoting so long as they are 'non-arbitrary'. Power is arbitrary if it facilitates the sort of interference where the interferer can act as they please: exempt from accountability, immune from retribution, and impervious to the interests of the interferee. State power, or *imperium*, need not be arbitrary and therefore dominating if it fulfils rule of law criteria and is properly institutionalised to promote the public interest. This is brought out with the example of a colony ruled by a policy of 'benign neglect' (Lovett 2006). If the colony revolts and is granted political independence, the new administration is likely to institute democracy, laws and a constitution. Under freedom of interference, its citizens are likely to appear to be less free after political independence, as there are more laws and institutions to interfere in the private lives of individuals. Under freedom of non-domination, the citizens have achieved a greater measure of freedom – which is more in line with our intuitions.

Philip Pettit has written widely on domination and his work is considered the fullest examination of what the republican polity would entail, therefore I will focus on his work in this section. Pettit's (1996: 578) definition of domination is as follows: 'One agent dominates another if and only if he or she has a certain power over the other: in particular the power to interfere in the affairs of another and inflict a certain damage'. Someone has dominating power 'to the extent that 1) they have the capacity to interfere, 2) on an arbitrary basis, 3) in certain choices that the other is in a position to make' (1997: 52). This tripartite structure has the advantage of a great deal of descriptive precision, as well as providing a nuanced way to determine domination which does not involve the simplistic identification of citizenship with non-domination as in Bohman's theory.

Freedom is still defined on the basis of a relationship to interference but is not the negative correlation supported by theorists of freedom as non-interference. The definition of interference here is broadly similar, for Pettit (1996: 578) interference is a 'more or less intentional attempt to worsen an agent's situation of choice', which can include coercion or threats of coercion, but not accidents, or bribes or rewards. This is a commonly accepted definition of interference as when an agent interferes with another such that they hinder the other from doing what they would otherwise have done (Wall 2001). Pettit's definition has been criticised for leaving out cases of unintentional interference (Kramer 2008: 39-41). However this is in line with Pettit's (1997: 66). aim to develop an account of how people affect one another rather than how bad luck can incapacitate; freedom in the republican tradition is a 'social ideal whose realization presupposes the presence of a number of mutually interactive agents'. Moreover, it is compatible with the widely-accepted distinction between natural obstacles and human-attributable constraints, such as those described in David Miller's (1983) classic essay on freedom. The identification of power with 'capacity of interference' is also seen as a sophisticated move in the literature on power. 'Capacity' means that an agent can have someone in their power regardless of whether the power is exercised, which avoids the 'exercise fallacy' that theories of power sometimes commit (Morris 2006). For example a bottle of whisky has the *capacity* to intoxicate while still in the bottle, but it *exercises* this only when it is drunk (Kenny 1975: 10).

Arbitrariness has proved a distinctly thornier issue, despite or perhaps because of the fact that the success of the republican theory of freedom is heavily reliant on a coherent and justifiable concept of arbitrariness. As Patchen Markell (2008: 13) observes, the 'place of the concept of arbitrariness is straightforward: it distinguishes unacceptable from acceptable powers of interference'. Arbitrariness is crucial to the two distinct features of the republican tradition that I outlined above. It first identifies instances of citizen power or *dominium* and therefore mandates state intervention, and second identifies legitimate instances of state power or *imperium* and therefore justifies state interference. Both roles emphasise the weight borne by arbitrariness in the republican theory of freedom due to the greater potential for harm in the exercise of state power than of private power. As Pettit (1997: 112)

puts it, ‘the public abuse of *imperium*... does far more damage to the case of non-domination than the private abuse of *dominium* that it is designed to reduce’. The arbitrary power theory of domination therefore stands or falls with its definition of arbitrariness, and so it is worth devoting some time to it here.

Arbitrariness as ‘tracked interests’

Arbitrary, according to the Oxford English Dictionary, can mean dependent on will or pleasure, discretionary, derived from mere opinion or preference rather than the ‘nature of things’ or ‘unrestrained in the exercise of will... hence despotic, tyrannical’ (Oxford English Dictionary, 1989). Its meaning is therefore inherently imprecise. Nonetheless, there is something close to a consensus that power is arbitrary if it enables interference to be perpetrated with impunity, subject only to the will of the power-holder. As Skinner (2008: 86) explains, a ‘*dominus* or master’s power is said to be arbitrary in the sense that it is always open to him to govern his slaves, with impunity, according to his mere *arbitrium*, his own will, and desires’. Pettit (1997: 57) similarly describes arbitrary power as when ‘[t]he only brake on the interference that they can inflict is the brake of their own untrammelled choice or their own unchecked judgement, their own *arbitrium*’. The problem with invoking impunity is that although it gives a vivid description of what arbitrary power looks like, it gives less indication of what *non-arbitrary* power looks like, in other words, the occasions when the state should not and need not intervene. We can readily identify situations when impunity obtains, but might struggle to determine the level after which impunity could be said to be missing. Similarly, power that can be exercised only in accordance with the power-holder’s will is a rich and vivid idea, but does not delineate what it would mean for something *not* to be exercisable only according to their will; we have no sense of what else it should be exercisable in relation to. If a slave’s master exercised power only according to the will of her own master, or according to a strict code of conduct which had been passed down through generations of slave-owners, this would still not be arbitrary on the dependence on will/impunity account described above.

Pettit’s (1997: 55) solution is to substantiate the meaning of arbitrariness as something insufficiently connected to the interests of the subject.

An act is perpetrated on an arbitrary basis, we can say, if it is subject just to the *arbitrium*, the decision or judgement, of the agent; the agent was in a position to choose it or not choose it, at their pleasure... And in particular, since interference with others is involved, we imply that it is chosen or rejected without reference to the interests, or the opinions, of those affected. The choice is not forced to track what the interests of those others require according to their own judgements.’

The commonalities and departures from the dependence on will/impunity account are clear. Pettit shares the general definition of arbitrariness as subject only to the will of the power-holder, but adds detail on what non-arbitrariness requires. This helps Pettit avoid what he calls the ‘black-or-white’ objection he attributes to Paley: that domination does not admit of degrees. Thus the principle of tracked interests allows Pettit to give arbitrariness its measurement dimension.

A necessary point of clarification here, however, is that it is not the extent to which interference promotes or respects interests that makes it more or less arbitrary. Arbitrariness is procedural, that is, it refers to the lack of ‘controls’ on the way in which power is exercised, rather than the consequences its exercise effects. An act can be arbitrary on this account even if it in fact furthers the interests of those affected, if the fact that it does is contingent rather than a necessary consequence of systemic checks. Pettit (1997: 55) maintains that ‘an act of interference will be non-arbitrary to the extent that it is forced to track the interests and ideas of the person suffering the interference’. The measurement scope identified above is less straightforward therefore than the introduction of interests would seem to imply. Arbitrariness is *not* directly related to the degree to which interference promotes or respects interests.

Despite this, most of the focus on the concept of arbitrariness has been on the substantive content of interests, rather than on what could constitute ‘forcing’ them to be tracked. Pettit refers variously to ‘relevant’ interests (1997: 55), to ‘common’ and ‘avowable’ or ‘avowal ready’ interests (2001: 156) and to ‘politically relevant, as distinct from special, interests’ (1997: 287). The most commonly raised objection is that Pettit’s theory of arbitrariness imports a normatively loaded content into a descriptive theory. In this vein, Christopher McMahon (2005: 68-70) argues that freedom as non-domination masquerades as a ‘naturalistic’ conception of freedom, that is, of the absence of impediment. In fact it represents a ‘normative’ conception of freedom as it involves the possession of normative powers. Likewise, Carter (2008: 65) claims that Pettit’s theory ‘appears to *moralize* the concept of freedom’. What is in the common interest and one’s personal interest will often diverge, so deciding what constraints on individuals are justifiable in the name of the common good will require judgements about the proper role of the state. As Pettit (2006: 278) himself points out in his reply to McMahon, this would mean ‘that whether an act of interference is arbitrary or nonarbitrary can be reliably agreed upon only among those who share the same normative viewpoint’. Moreover, a further implication of a moralised conception of freedom is that it means ‘the protection of freedom cannot be the most basic principle of justice, since the norms that fix the reference of the concept (the principles that define ‘unjust’....) are logically prior to the principle that the state should protect liberty per se’ (Christman 1998: 203). Markell (2008: 34 n. 25) identifies a further problem here, that avowal-ready interests have passed through ‘legitimizing filters’ and thus represent the interests that one *ought* to have, not that one actually does have.

Other scholars have criticised different aspects of ‘interests’. Lovett contends that the problem of specifying legitimate interference is overly bound up with democracy. Lovett’s worry is not about the normative content of Pettit’s theory of arbitrariness, but about the fact that it is parasitic on the outcome of democratic institutions. If the common good is not what it *ought* to be, then it must be the

result of democratic procedures which have established it as such. But if Pettit's conception of arbitrariness is dependent on democracy, then this falls foul of the prescription-in-definition problem outlined earlier. Specifically, it undermines the case for democracy as reducing domination if identifying domination was dependent on the outcomes of democratic procedures: 'This argument is trivialized, however, if we define domination such that it becomes analytically true: the argument would then be analogous to saying that the reason to earn lots of money is because doing so will make you rich' (Lovett 2010: 117). On the other hand, Marilyn Friedman (2008) maintains that Pettit elides two different aspects of interests, actual interests and the other interests as people see them. According to Friedman, Pettit's claim that arbitrary interference is that which is 'not forced to track what the interest of those other require according to their own judgements' (Pettit 1997: 55) suggests that it is people's opinions of their interests that count, but elsewhere his reference to 'interests and ideas' suggests that it is both the real interests and people's opinions of what they are that are relevant to arbitrariness.

It might seem that these objections cannot happily coexist, as they rest on different interpretations of the interests requirement. But I want to suggest that this imprecision is in fact present in Pettit, and what is more, it is not inherently problematic. There are three steps to my argument. My first move is to demonstrate the problems associated with defining arbitrariness in the absence of a substantive component, by comparing the definition of arbitrariness provided by Lovett. The second step is to postulate that the place occupied by such a substantive component means that its moral content is of secondary concern. The third step is to present a case for severing the two dimensions of arbitrariness in order to more explicitly draw out their different functions.

Lovett has developed what can be described as a rule-of-law account of arbitrariness. In order to demonstrate the need for the component of arbitrariness Lovett asks us to consider what the relevant difference is between citizens in the modern United States and Stalin's Russia. Under a conception of domination as mere imbalance of power, citizens in both countries seem to be subject to comparable levels of domination. Lovett (2010: 96) maintains that the difference is the extent to which the exercise of power is 'not externally constrained by effective rules, procedures, or goals that are common knowledge to all persons or groups concerned'. Constraints in this context include formal laws so long as they are supported by effective constraints external to the power-wielding groups or persons. However, arbitrariness is not merely the absence of formal laws, but exists when there is a gap in social conventions, of which laws are merely one part. Social conventions are effective constraints on behaviour if people behave in a certain way by reference to a rule, rather than their preferences. The degree to which arbitrariness obtains is a matter of the 'scope of arbitrariness left to the agent of domination by existing social conventions' (119).

One of the advantages to Lovett's account is that it follows that people can curb the harmful effects of dependence on a powerful criminal justice system by following the rules and planning ahead. But although this 'external constraints' approach makes intuitive sense, this is probably because it coheres with intuitions about where power should be constrained. In fact, it is explicitly dependent on having already established where constraints should be imposed. A gap in social and legal conventions is only identifiable if we know what sort of conventions are normatively desirable. To give an example, the power that parents, carers and teachers have over their dependents is not only the power to do 'evil' but also the power to do good, to put it crudely. Even if we wish to say that all of these relations should be constrained as it is the possibility of harm that matters, this still leaves us with a problem of what external constraints to impose. We might wish to argue that parents should be constrained in the exercise of their power over their children by outlawing abuse, violence and neglect, but we need another conception of 'wrong' to identify why abuse, violence and neglect are the sorts of exercises of power that we wish to prevent.

The external constraints model leads to two further unpalatable conclusions. First, it suggests that any increase in external constraints would lead to less arbitrariness and therefore that the codification, regulation and legislation of power is always a good thing and any increase in these formal rules will reduce arbitrariness. In reality, we would expect that after exceeding a critical mass, an increase in legislation would have little effect in reducing arbitrariness, moreover it might be undesirable – Pettit (1997: 106) argues that increasing non-domination at the expense of non-interference beyond a certain point might be unproductive as even if it leaves people with a high amount of freedom of the person it might restrict their room to manoeuvre. Second, it cannot account for the wrong of institutional discrimination. Lovett acknowledges that on his model, a system characterised by a multitude of legal rules and constraints would not be dominating, even if it entrenched discrimination, slavery or oppression. Jim Crow laws in the American South, apartheid in South Africa, or the legal liabilities imposed on European Jews would seemingly not be characterised as arbitrary. He contends that this problem can be overcome as it is not the system that dominates people in a policy of apartheid but people within the system. Discriminatory laws facilitate social relationships where people or groups can wield arbitrary power over others; they do not constitute the domination themselves. But this runs counter to the central republican intuition about freedom – that the institutional practice of slavery renders someone unfree regardless of the particular outcomes and features of the individual relationships between masters and slaves. Institutionalised slavery adds insult to injury, as it makes the harm done by domination exempt from punishment, it does not facilitate the autonomy of the slave who can plan for her maltreatment. As Steven Wall (2001: 219) observes, a slave is still a slave even if his master follows a strict code of rules.

Evaluating this alternative conception of arbitrariness therefore demonstrates two things. The first is

that the rule of law significantly reduces arbitrariness only if it has already been established to be fair according to some other criterion, as the slavery example shows. I will leave it open for the time being as to whether or not codification and regulation, even if morally iniquitous, reduces arbitrariness *at all*. The second, and related point, is that Lovett's theory gives us an account of *how* a system can be made less arbitrary, but not *where* a system should be made less arbitrary. A rule of law account lacks a 'direction' towards which procedural mechanisms are to be imposed. I think that this demonstrates that some substantive content is imperative for any conception of arbitrariness to make sense.

We therefore need to examine what the role of such substantive content should be. Pettit's writings on the subject indicate that he sees the question of substantiating 'interests' as secondary to the question of controls on the power of interference, the 'forced' in the 'forced to track the interests' formulation. This is because, as the objections above show, the definition of interests is relatively open – whether 'common avowable' for the purposes of state power or 'relevant' for the purposes of private power, or pertaining to 'interests and ideas'. Lovett (2010: 114) argues that such openness 'will degenerate into the unhelpful truism that we should promote people's objectively-defined, normatively justifiable interests, whatever these turn out to be'. However, I am unconvinced that Lovett is right about this being 'unhelpful'. Pettit's point is surely that the emphasis should be on the mechanisms and structural features of power systems and the way in which they are responsive to interests *whatever these may be*. In fact, Pettit's model could hold even if we replaced 'interests' with some other, substantive goal such as human rights, or treating people as equals.

However, the focus on mechanisms and the openness towards the substantive component does reinforce Lovett's objection that this renders Pettit's account circular by pre-empting the need for democracy at the point of descriptive theory. The first response to this is that the objection would only succeed if democracy were the only means of institutionalising checks on whether the exercise of power is in the interests of those affected. But Pettit clearly specifies that his model applies to dominium as well as imperium; dominium is not arbitrary provided the agents affected by the power are able to 'invigilate' the choices of the power-holder. Power is non-arbitrary if the appropriate mechanisms are available for power-subjects to check the exercise of power, in which case they exercise 'counter-control' (Pettit 2008a).

Lovett's second claim is that Pettit's account debars us from being able to say 'whether persons or groups are subject to domination until we first determine which interests they would express through suitably-designed deliberative procedures' (117). But the flipside of Lovett's point is that no one can be considered to be non-dominated unless democratic procedures have proven that their interests are being tracked, which is an important insight derived from Pettit's notion of tracked interests. The requirement to track avowable interests means that at the very least, someone's interests must have

the capacity to become avowable, which is a strong inclusive impulse. Regardless of whether you consider interests to be a fixed set or to be the result of deliberative proceedings, being forced to track someone's interests means being forced to include them in the calculation of what action to take or not to take. Imagine a teacher has a class of 30 pupils, and that he is only forced to track the interests of 20 as only these 20 have parents and therefore demand progress reports. If the headteacher intervenes to request that the teacher provides her with regular progress reports for all the pupils, orphans included, then the teacher is forced to track the interests of all of them. Thus part of what it means to have your interests tracked is to be acknowledged as a relevant interest-holder, which has a moral force independently of what these interests turn out to be.

I want to argue that a model of procedural mechanisms for the guarantee of non-arbitrariness should take account of this inclusive principle. In particular, a conception of non-arbitrary interference should delineate a link between the checks on the power and those affected by the power, which Lovett's account fails to do. However, more needs to be said about the way in which checks and controls relate to this principle, and to interests. In the final section of this paper, I will describe how I think this is possible, through the introduction of the principle of accountability. One of the sources of confusion in Pettit's conception of arbitrariness is that it fulfils two roles: one of evaluating types of interference, and one of measuring the checks on power. The conflation of these two roles obscures the fact that arbitrariness increases to the degree that power is not checked, not to the degree that interference tracks interests. I will contend that we should distinguish between arbitrariness as an evaluative standard for identifying the sorts of interference which are justifiable or mandated, and arbitrariness as a measure of the extent of controls on this power.

The overdemandingness objection

The second group of objections to Pettit's theory cluster around its perceived overdemandingness. The worry here is that on the definition of domination set out above, there would be a ubiquity of dominating scenarios that would mandate state intervention. Along these lines, Friedman (2008: 251) argues that regulating 'unused capacities' for arbitrary interference would require state intervention on the scale of a totalitarian state. Wall (2001: 225) advances a similar scenario which he calls the 'case of the illiberal rule-following government', a government that interferes with everything its citizens do, but non-arbitrarily.

A related criticism takes issue with how Pettit's account generalises the degree of domination people are subject to. This objection disputes the fact that two agents are dominated to the same degree if one is subject to the choices of a power-holder who is extremely likely to use their capacity for interference while the other power-holder is extremely unlikely to do so. Pettit (1997: 88) is clear on the emphasis on *possibility*: 'Seeing an option as an improbable choice for an agent, even as a

vanishingly improbable choice, is different from seeing it as a choice that is not accessible to the agent: seeing it as a choice that is not within the agent's power. Thus the fact that another person is unlikely to interfere with me, just because they happen to have no interest in interfering, is consistent with their retaining access to the option of interfering with me.' Conversely, Matthew Kramer (2008: 43) argues that an 'indulgently uninterfering dominator' does not curtail freedom to the extent that they permit those affected by their power significant latitude to perform various actions.

The third version of the overdemandingness objection disputes Pettit's suggestion that all women or ethnic minorities are subject to the same levels of domination because they are members of the same 'vulnerability class'. Like Kramer, Friedman (2008) contests the implication that a woman whose husband is unlikely to arbitrarily interfere with her is still dominated. But she finds additional fault with the way in which Pettit's claim groups individuals together, masking internal group differences. She evokes the second-wave feminist concern with 'essentialising' women's interests as to do so understates the challenges faced by different subgroups of women. Indeed, the terminology used by Pettit in his exploration of group vulnerability does suggest over-generalisation. Pettit (1997: 122-3 *my emphasis*) argues that a vulnerability class is a group you share with people of 'your ilk in matters of resistance and exposure to interference'. He says '*to the extent* that they are dominated, you too are dominated' and '*to the extent* than any woman can be abused on an arbitrary basis by her husband, womanhood is a badge of vulnerability that you, fortunate though you are, must bear in common with others'. The suggestion that all members of groups experience the same levels of domination is surprising, and makes Friedman's objection all the more cogent.

All three of these objections raise similar problems. These are that in a state orientated around the goal of non-domination, significant resources will be allocated to addressing situations which may not seem particularly wrong. This, in turn, may lead to a situation where there is an infinite proliferation of legislation to deal with mere 'potential' for capacity interference which may bear no resemblance to the 'actual' interference in the real world. There is much to say about this debate, and I cannot do it full justice here.¹⁹ However, I can recommend a minor clarification which, I hope, will aid understanding about the distinction between probability and possibility. I also want to suggest that the concept of a 'vulnerability class' raises problems that cannot be so straightforwardly addressed using only the conceptual tools provided by Pettit. Specifically, vulnerability classes cannot make proper sense unless we develop a conception of dependence.

¹⁹ Specifically, it would be slightly off point to engage with the case made by Kramer and Carter for the way in which liberty as non-interference can integrate the intuitions of domination theorists, the 'equivalent judgements thesis', as my concern here is to compare and contrast different theories of domination, not the theories of liberty as non-domination and as non-interference.

The first issue is whether or not the impossibility of arbitrary interference is a valid goal. Kramer's argument is that the distinction between making interference improbable and impossible is problematic because the real world constraint of limited resources means that the course of action available to the state is only ever to make interference less probable. Kramer's point is compelling – even in a well-legislated society interference cannot be made inaccessible because someone may simply choose to defy laws and absorb the punishment. Alternatively they may not think in such a cost-benefit way in relation to obeying the law – due to a bad temper, or a personality disorder, or a lack of interest in living a life outside prison. Thus Kramer is right that there is some shared ground between the interference and domination theorists' characterisation of the rule of law. Both concede that laws backed up by coercive sanctions do not themselves rule out particular options. For Kramer the point is that coercive laws restrict options because they remove a particular combination of liberties (breaking the law and staying out of prison), rather than removing the liberty to break a particular law as such. Domination theorists have to concede a similar point - that law only makes certain options less eligible by raising the exercise costs of arbitrary interference rather than making these options ineligible for a potential dominator to take. To this extent Kramer is right; the impossibility of arbitrary interference is a chimera.

However, Kramer is wrong in his claim that this means that low probability of arbitrary interference, whatever the source of such a probability calculation, is the only alternative. The distinction that Kramer fails to acknowledge is the one between probability and eligibility, feasibility or accessibility. The point is to make arbitrary interference less accessible as a choice, not merely to make it less probable. Domination theorists' position is that the capacity for arbitrary interference exists where it can be exercised with impunity. Making arbitrary interference impossible may itself be impossible, as Kramer argues, so in practical terms such a goal will entail 'less' possibility. But that does not mean that the only other viable goal is to make interference less probable. Where Kramer goes wrong is by assuming that less possibility means less probability. Rather, it means less feasibility; increasing the exercise costs of arbitrary interference in order to reduce its accessibility or eligibility as an option for the power-holder.

The second issue under contention is which features of a power relationship are relevant for calculating freedom. Specifically, can a power-holder's benevolent disposition (and lack of inclination to exercise a power of arbitrary interference) prevent them from being a source of unfreedom? This is relevant to the possibility/probability distinction because it informs whether being permitted a degree of free rein over one's actions increases freedom even in the presence of the potential for arbitrary interference. Kramer (2008: 47) proposes the example of the 'Gentle Giant', a powerful being who is 'far larger and stronger and swifter and more intelligent than his compatriots'. The Gentle Giant has a benevolent temperament and the probability of him interfering with the liberties of his compatriots is

effectively nil due to his inclinations and self-sufficiency, why he should be considered a source of unfreedom? In fact, we can take Kramer's example on step further. It seems absurd to argue that in an alternative scenario with a 'Grumpy Giant', who has all the same power but a malevolent temperament, his fellow citizens will be dominated *to the same degree*. This critique then has a similar content to the problem relating to the vulnerability classes identified above.

I think there are two related issues here. One is whether benevolence can ever be sufficiently guaranteed. The other is whether internal rather than external constraints on this power of arbitrary interference are relevant to freedom. Markell (2008: 14) contends that republicans are committed to the view that non-accidental benevolence would mean a reduction in domination experienced by those affected. He cites Pettit on this point; benevolence reduces the intensity of the power of arbitrary interference if the power-holder 'acknowledges a code of *noblesse oblige*' (Pettit 1997: 64). But Pettit's point is that such a code makes someone 'answerable in the court of certain considerations', which removes impunity. Thus it is not the fact that benevolence is guaranteed or non-accidental, but that there is some external accountability: 'they can be quoted, as it were, against themselves' (64). This leaves unresolved the question of whether accountability could be imposed internally – say if someone were devoutly religious and reflected on their own wrongdoings and imposed punishment on themselves periodically.

A more fruitful line of response to Kramer however, clarifies and slightly modifies the definition of power. In his description of the Gentle Giant Kramer (2008: 47-8) refers to 'ingrained features of his character', therefore we can assume that the sort of situation he has in mind is one where the benevolence is non-accidental. I think the reason why we would wish to say the Gentle Giant is less dominating is not, pace Kramer, because he is less likely to exercise his power of arbitrary interference, and also not because he has made himself accountable, as in the concession made by Pettit. It is rather that the Gentle Giant is less powerful than the Grumpy Giant. There is no reason why 'ingrained features' of someone's disposition should not contribute to the sum total of their power in the same way as strength and intelligence. A Mafioso who has built up a tolerance to pain, or one who lacks fear, is able to perpetrate more violence and spark more fear throughout the community. On the other hand a gang member who cannot stand the sight of blood, or is haunted by the faces of his victims, is unlikely to wield as much dominating power. In this situation, we can say that the exercise costs of arbitrary interference differ for these two types of power-holder.

Although Pettit does not explicitly use the term 'exercise costs', the implication is that variations in exercise costs translate to different levels of dominating power. Pettit (2006: 281) that the ability to interfere 'will come in degrees, depending on the difficulties and costs' faced by the power-agent. However, I suspect that Pettit would be reticent to make the concession outlined above, for the

following reasons. First, internal constraints can change. The Gentle Giant may sustain a head injury and as a result become violent or megalomaniacal. Second, even if the exercise costs of arbitrary interference would technically be higher for the Gentle Giant than the Grumpy Giant, the Gentle Giant would still have a relatively high amount of power of interference. The worry in both of these examples is the lack of institutional responsiveness if the situation were to change, and to the power of arbitrary interference that the Gentle Giant retains. Even if Pettit was willing to grant that cohabitants of the Gentle Giant are more free than those of the Grumpy Giant, he might hold that those who live near the Gentle Giant are *vulnerable* to domination.

This leads us to a potential response to the ‘vulnerability class’ objection. Friedman is right that Pettit’s writings on this are equivocal. At times he suggests that people in the same vulnerability class are dominated to the ‘same degree’, while elsewhere he concedes internal differences: ‘They may be well situated relative to other members of the class and do slightly better in the protections that are available to them’ (122). Perhaps Pettit wishes to say that domination is likely to vary, but vulnerability to domination is in some way shared. Domination is unlikely to be a result only of membership in a group, and some people may be members of multiple vulnerability classes – ethnic minority women, for example. Thus membership of a group may just be a building block in a more nuanced picture of domination made up of all the power relations a particular group member is subject to. It makes sense to say that vulnerability is in some way shared if a structural feature of group membership indicates an increase or decrease in the relative components of domination.

Nonetheless, it is still questionable why a necessary condition for the enjoyment of non-domination for members of a vulnerability class is the non-domination of *all* members. Pettit says that if a vulnerability class has ‘a salient unity, then they must recognize that there is no way of achieving the best in the way of non-domination – the best that non-members can achieve – short of eliminating the domination of all members of the class’ (122-3). But he does not specify what might constitute such unity, or why individual domination levels could not improve independently of the domination levels of the group. I think that the answer may be found in the idea of dependence. The shared feature of the vulnerability classes Pettit cites seems to be that the group is hard to leave. Women cannot leave the group of women, thus womanhood is a ‘badge of vulnerability’ (123). We can posit that exit costs define the shared vulnerability which makes it in the interests of all women to improve the domination of the vulnerability class of women. This approach emphasises the fact that freedom is shared, collective, and only resiliently guaranteed by one’s status.

The perspective of policy-makers on the other hand casts a slightly different light on shared vulnerability. First, individual levels of domination are not precisely determinable, due to the epistemic obstacles to knowing how much power each person is subject to (in light of my revision to the

definition of power as a function of exercise costs). If we cannot know whether someone is dominated because we do not know how high the exercise costs of interference are, the appropriate response is to err on the side of caution. This entails promoting the situation of the worst-off in the group – which connects with Pettit’s writing on eliminating the domination of all members of a class. This also explains why internal dispositions cannot be counted in judgements about vulnerability to domination, because of the need to be risk-averse. There seems therefore to be a gap between the descriptive, real levels of domination and the prescriptive approach to dealing with potential levels of domination. As it would also be cumbersome to say the least to attempt to calculate individual levels of domination, it is reasonable for policy-makers to generalise on the basis of certain indicators, of which dependence is one.

The introduction of dependence therefore seems to be a logical step to refining Pettit’s theory. As Lovett has made dependence a core component of his theory of domination, I turn to his work next.

IV: Domination as “Dependence on Unconstrained Power”

Frank Lovett’s recently published book-length study of domination aims to define it in descriptive, non-normative terms. Lovett (2010: 2) defines domination as ‘a condition experienced by persons or groups to the extent that they are dependent on a social relationship in which some other person or group wields arbitrary power over them’. Thus he situates his theory within the arbitrary power theory of domination, like Pettit. His main departures from Pettit are in his conception of arbitrariness, and in his inclusion of the component of dependence. I will focus predominantly on the issue of dependence, having argued in the last section that Lovett’s conception of arbitrariness is less rich and coherent than Pettit’s.

Dependence is defined by Lovett as a function of exit costs, ‘the degree to which a person or group’s continued membership in some social relationship is not voluntary’ (39). Lovett argues that without dependence, it does not make sense why people would not leave the scene of their domination. Dependence is a necessary, but not sufficient, condition of domination, for Lovett. He further contends that dependence and domination are rough correlates, in that if dependence is high and the other conditions of domination obtain, we would expect domination to be high: ‘given two social relationships with otherwise equivalent structural environments, the domination suffered will be worse in the one where the dependency of the subjects is higher (52).

Dependence makes sense of the *harm* of domination as it demonstrates when domination is forced or unavoidable. Wall (2001: 219) makes a similar point: ‘[s]ubmission to the arbitrary will of another does not really constitute being dominated by the other if one is perfectly free to walk away from the relationship whenever one wants without incurring any significant costs’. Lovett’s (2001: 51) examples of dependence also fit with our intuitions about what magnifies the harm people are subject to in

abuses of power. He gives two examples. In societies where divorce is difficult for women due to the social shame, difficulties in living alone, or discriminatory family law, the exit costs of leaving marriage are higher, so domination will be higher. Similarly, in totalitarian states, the exit costs of leaving are high and totalitarian states have often raised the costs of attempted emigration. This renders citizens more vulnerable to abuses. Thus the inclusion of dependence is intuitively compelling.

Lovett's conception of dependence is also sophisticated in its descriptive ability to explicate complex situations of domination, and to discern different levels of domination. First, it makes sense of why someone can be dominated because of the broader social context beyond just one power relationship. If the exit costs of leaving a particular relationship are low, but the prospects are equally dismal elsewhere, this does not mean domination is low if a person only has a choice between several fairly similar masters and no real possibility of having no master. Alternatively workers may have low exit costs in relation to a particular employer but only have the option of finding employment with equally exploitative employers elsewhere. Lovett calls this 'decentralized domination' and argues that it is situations like this that sometimes give the impression of agent-less domination. He argues that the relevant exit costs are not of leaving a particular relationship with a specific master or employer, but of having a master or not (52-54). The second nuance to the inclusion of dependence is that exit costs are, according to Lovett, a matter of the perception of the subject of the power. This means that dependence is not based on some objectively observable criteria like the extent to which someone's interests are dependent on a particular relationship. This is advantageous, as it is not based on a contentious standard. However it is also problematic, as it means that we can never fully determine how dominated someone is. In my view, this is inescapable in determining levels of domination; we must accept a degree of generalisation.

Nevertheless, there are persuasive arguments against the inclusion of dependence in our understanding of domination. One such objection has been put forward by Friedman, albeit writing about Pettit's work. Friedman (2009: 253) claims that the arbitrary power theory is insufficiently sensitive to the important role of dependence in everyday relationships: 'the capacities of people to interfere arbitrarily in the lives of others are often, if not always, also capacities to interfere nonarbitrarily for the benefit and care of those others'. Friedman has in mind relationships of care, nurture and dependence like parents and children, or carers and patients. She contends that '[a]n excess of power relative to another, which almost certainly constitutes domination on Pettit's view, seems nevertheless to be a necessary feature of relationships in which some people care for and meet the needs of others'. Power and dependence are necessary conditions for relationships of care and nurture because '[t]he capacity to clean someone's wound is also the capacity to infect it. The capacity to help someone climb the stairs is also the capacity to throw her down the stairs' (254).

However, Lovett's claim is that dependence amplifies existent harms. All else being equal, in a situation of arbitrary power, dependence makes it worse. Seen from this perspective, Friedman should be amenable to the addition of dependence as a component to theories of domination. Feminists are likely to be sympathetic to the addition of dependence because it explains why certain relationships are more dominating than others, emphasising the social context and potential opportunities available to the power-subject if they were to leave. It also explains why sometimes remaining in a negative relationship is more attractive than leaving. Moreover, clarifying that dependence should be included in domination as a component, rather than used as a description of the state of domination, should alleviate Friedman's concerns that the concept is used disparagingly. While Skinner uses the term as a synonym for subjugation or domination, for Lovett it is a risk factor which puts weight on the need for the justification and accountability of power.

Nevertheless, Friedman is right to highlight the danger of over-legislating capacities for interference. In the last section I argued that Lovett's conception of arbitrariness would lead to a proliferation of legislation on any potential for interference, as it lacked the conceptual tools to distinguish good from bad forms of interference. Friedman's point also indicates that an account of arbitrariness should not be to do with merely limiting or constraining the power of interference. I would like to suggest that dependence puts emphasis on the need for accountability instead. The higher someone's dependence, the higher the need for accountability. On my account, if someone in a position of power *failed* to carry out good types of interference, and their power-subject was dependent on them, as in Friedman's examples, they would be harmed. For example, the power to make children go to bed at a reasonable hour, or to eat vegetables, even if this involves force-feeding, are all clearly examples of parents' capacities for positive interference. The question we should ask is not merely 'is this interference justified?' (whether the interference tracks the interests of the children). We have a broader concern about the accountability of parents for their action and inaction - if the parents failed to act this would be negligent and would cause the children harm.

Next, I turn to my model of domination as dependence on unaccountable power, in order to develop this and the other intuitions I have raised in response to the other theorists.

V - Domination as Dependence on Unaccountable Power

To recap, I have argued that a conception of domination should first be able to admit of degrees, second distinguish between the procedural and substantive dimensions of arbitrariness, third tie non-arbitrariness to the specific power relation between the power-bearer and the power-subject, and finally explain why people do not leave the site of their domination. In this final section I set out my conception of domination and why I think it fulfils these four criteria.

On my account, an individual is dominated to the extent that they are dependent on a relationship of

power, to the degree of strength of the power, and to the extent that the power of interference is unaccountable. For the purposes of my theory, dependence is a function of the subjective exit costs of the power-subject, and power is a function of the subjective exercise costs of interference of the power-holder. Because these costs are subjective, they can never be fully determined for the purposes of establishing if someone is dominated. Therefore, we should generally speak in terms of the ‘vulnerability’ of individuals to domination, rather than describing them as dominated.

1. *Accountability*

Accountability, or more specifically ‘institutional accountability’, can be defined as the responsiveness of institutions or agents to the interests of those who are subject to their power. Specifically, institutional accountability requires three types of mechanisms all of which can be evaluated in relation to the normative goal of tracking the interests of those subject to the power. Accountability increases to the degree that the mechanisms are imposed, not to the degree that a certain act promotes interests. Replacing the ‘controls’ dimension of arbitrariness with accountability makes intuitive sense. First, the antonym of impunity can reasonably be said to be accountability, or something like it. Second, linguistically, the term ‘accountability’ provokes a series of subquestions which detail the conditions for accountability to obtain in a particular situation, as speaking of accountability requires us to specify *to whom*, and *for what*. The former question anticipates Pettit’s inclusive principle that I argued we should incorporate into a revised conception of domination. Interestingly, all other potential antonyms of impunity also generate these sorts of questions, including liability, responsibility, punishment or penalty.

Unfortunately, the concept of accountability is not entirely straightforward as it is not either present or absent, unlike ‘impunity’ for example. Moreover, it is not too closely defined; it can be increased almost indefinitely. It is therefore best seen as a maximal value *and* a threshold concept. Accountability must cross a certain level for non-domination to obtain, and if it falls below a certain level domination will obtain. However, accountability also admits of degrees, and it will increase or decrease domination to the degree that it is absent or present.

The aim of accountability as a clarification of Pettit’s account is to distinguish between what makes a power relationship *domination* (that it is unaccountable) and what makes a power relationship *bad* (that it violates the principle of legitimacy as tracked interests). Accountability is related to, but not correlated with, substantive arbitrariness because the principle of tracked interests provides the substantive principle of *legitimacy* that the mechanisms of accountability can be measured against. Accountability (and thus non-domination) is increased as its three mechanisms are fulfilled, not to the degree that power or an act of interference fulfils the principle of legitimacy, so the principle of legitimacy provides a way to evaluate the mechanisms of accountability; domination is not reduced or

increased as a correlate to legitimacy. The mechanisms of accountability are as follows:

Justification: This is the requirement that the exercise of power is justified to all subjects of the power. This is an *ex ante* element of accountability as it refers to the extent to which officials are aware of who will be affected by their policies and view them as appropriate addressees of the justification for them. It adapts what I argued was the inclusive aspect of Pettit's notion of tracked interests – including someone in your decision for action. Justification also shares the appeal made in discourse theory to provide reasons to all who are affected by a certain decision on terms which could be acceptable to them (e.g. Benhabib 2004). Justification is evaluated according to the substantive principle of legitimacy as it considers whether a particular power-subject is being treated as a relevant moral unit in considerations about what is in the public interest. Justification is violated not if someone's interests are not respected, but if they are not considered – for example if the public interest is defined as the common interests only of a particular group. To claim that the criterion of justification is not being met is therefore an appeal for *inclusion*.

Contestation: This is the requirement that the subjects of power have mechanisms to require power-agents to reconsider their decisions. Contestation can be defined as institutionally protected opportunities to object to policies. This is an *ex post* aspect of accountability, however it also has *ex ante* implications. The knowledge that someone can contest the exercise of power makes it more likely that the power will be exercised in a way that tracks their interests as potential complaints are anticipated. Once again, the substantive principle of legitimacy provides a direction or orientation for this mechanism. Power-subjects should be able to object that policies violate their interests. To be clear, the requirement is that there are means for power-subjects to object to the wielding of power, not that the power fulfils some standard of legitimacy. Pettit (1997, 1999) develops a concept of contestatory democracy as a means by which citizens act as checks or editors on the government, and this shares some features which that account. However, contestation need not be democratic, as a component of accountability it is merely the requirement for the subject of the power to have some means of holding the power-agent to account. This shares common ground with the self-initiation point made by Bohman. To claim that the criterion of contestation is not being met is therefore an appeal for *reconsideration*.

Retribution: This is the requirement that power that is wielded against someone's interests – the legitimacy condition – is suitably punished. This is an *ex post* element of accountability. It is also core to the idea of accountability; holding someone accountable often means that after the event they are required to atone and are duly punished for failures. The interesting aspect to retribution is that it is not definitively tied to the *subjects* of the power, unlike the other two conditions. Retribution aims to capture some of the force of Lovett's conception of arbitrariness concerning rules and external

constraints. If it is built into an institution that abuses of power will be punished then this has the effect of an external constraint on the exercise of power. To claim that the criterion of retribution is not being met is therefore an appeal for *reparation*.

2. *Dependence*

The second aspect of my definition of domination is *dependence*. Following Lovett, I define dependence as: *the sum of the subjective exit costs of leaving a social relationship*. Although dependence is not intrinsically bad as some relationships derive their value from being dependent, reducing dependence will always reduce domination – if someone is free to leave then they need not remain in their state of domination. Dependence and domination are thus correlated, but dependence does not entail domination and there are certain dependent relationships like familial relationships and relationships of care which we would not wish to do without. However, I see dependence as multiplying vulnerability to domination such that high dependence should represent a moral appeal for more accountability.

High levels of dependence combined with high levels of powers of interference also elicits a further concern, with *negligence*. Domination theorists have thus far paid insufficient attention to the relationship between domination and negligence. The focus has been on identifying themselves as distinct from freedom as non-interference theorists by not conceptualising interference as intrinsically bad. However, domination theorists are also committed to the view that interference is often mandated and not just tolerated. To fail to legislate in ways which give people protection against violent crime, for example, would be negligent. This shares Lovett's idea of gaps in social norms; it would be remiss for the state to fail to act in such a situation. However, what has been insufficiently developed by other theorists is that relationships of private power such as between teachers and students or parents and children can also be negligent. These power-holders should be accountable for not interfering, as well as for interfering. The point is that the existence of power of interference and dependence alone represents a moral imperative for accountability.

3. *Vulnerability*

I have argued that as we cannot determine the extent of a power-agent's power over a power-subject, we should speak instead of vulnerability to domination. I want to suggest that we should define vulnerability classes as groups who are vulnerable to domination on the definition above, but for whom we can identify low levels of accountability and high levels of dependence.

I said earlier that vulnerability was a kind of shorthand as it fulfils the role of allowing the state to pursue general policies (rather than intervene in each individual's affairs) and allows us to bypass epistemic limitations about the actual existence of domination. Someone is vulnerable to domination

if they are a member of a vulnerability class which tends to have high levels of dependence and low levels of accountability. I contended that this was a sufficient reason to mandate state action in order to improve the dependence and accountability of the power that such a group is subject to. However, an individual might also be a member of several vulnerability classes. Although I have said that domination is unknowable as we are unable to determine the extent of a power-agent's power, there is a good case for arguing that if an individual is a member of several vulnerability classes, and her dependence is high and the accountability of the power she is subject to low then she can be said to be 'dominated'.

VI: Conclusion

My account of domination as dependence on unaccountable power attempts to bring together the key advantages from the three theories examined in this chapter. I have tried to show that the procedural checks of accountability need to encompass a minimal level of 'self-initiation' or 'appeal', which was the intuition derived from Bohman's work. However, in order to avoid the problems with Bohman's account these self-directed forms of accountability can only be half of the story. The requirement of retribution, specifically, cannot be self-initiated but requires an external system of accountability; the rule of law. This latter requirement attempts to build into my model Lovett's idea of external constraints, which I have argued cannot stand alone partly because it lacks the self-initiated element. Nevertheless, the mainstay of my theory borrows heavily from Pettit's account. My differences with Pettit are small; I objected mainly to the elision of the substantive principle of tracked interests and the procedural checks and controls directed towards this principle. I have also argued that the addition of dependence casts Pettit's conception of vulnerability classes in a more favourable light.

One problem with my model is the imprecise conception of accountability. It might be said to resemble a patchwork quilt of theories of domination which tries to be all things to all people. My main response to this, unfortunately, is that vagueness is unavoidable, as there are significant problems with defining arbitrariness too closely. Accountability, on the other hand, is intuitively compelling and grounds concrete proposals for reducing domination. The introduction of accountability does undermine the predictive potential of domination as a theory of freedom as we cannot say exactly how free someone is in any particular scenario. However, as discourse on domination will always involve an element of imprecision and generality due to the need to speak of vulnerability rather than actual levels of domination this is not a fatal problem. My purpose in this part of my thesis is to evaluate domination as a policy approach to the treatment of resident non-citizens, not as a theory of freedom. In the next chapter I will apply the concept of domination developed here to denizens as a whole, and different groups of denizens, in order to determine whether they are vulnerable to domination.

Chapter 6 - The Vulnerability of Denizens: a Domination-Based Framework

‘Aliens’ have historically been subject to scapegoating and abuse. Responding to the fact that resident non-citizens or ‘denizens’ represent much higher numbers in liberal democratic states than ever before, James Bohman (2008) argues that denizens are dominated as, without political rights, they lack effective means to make claims upon their state of residence. But do we want to say that a German businessman living in France is dominated? Is he dominated to the same degree as an undocumented Filipino domestic worker? The former has been described as a example of a ‘Euro-denizen’ (Schmitter 2000), and the latter a ‘margizen’ (Martiniello 1994), both play on the term ‘denizen’ to emphasise the status variations of non-citizens. This chapter considers whether a more detailed conception of domination, along the lines of the one developed in the last chapter, might be able to substantiate the intuition that these two cases have quite different levels of domination. Nevertheless, there might be some vulnerability common to denizenship. Hence this chapter aims to establish whether resident non-citizens as a group are vulnerable to domination, the factors that influence this vulnerability, and whether there are groups of denizens who are particularly susceptible to domination. The objective is to provide a new normative approach to the treatment of migrants which is compatible with the dominant, ‘fair rights’ and ‘fair citizenship acquisition’ approaches, but that goes further in identifying the obstacles and vulnerability they face even in the presence of rights and access to citizenship.

In Chapter 5, I argued that someone is vulnerable to domination to the extent that they are dependent on unaccountable powers of interference. In this chapter I apply this conception of domination to the case study of resident non-citizens. In the first part of this chapter, I discuss the way in which domination can be measured, and the role of empirical evidence in substantiating the domination framework. In the second, I aim to establish whether denizens are vulnerable as a group, and factors that influence the vulnerability of denizens to domination. In the third part of this chapter, I examine the cases of four particularly vulnerable groups. In the next chapter, I will consider what should be done about the different forms of domination of denizens, including examining whether we should weigh the non-domination of non-citizens equally with the non-domination of citizens.

My argument in this chapter is that denizenship becomes a status of domination when denizens are highly dependent on the status of denizenship, and when it is characterised by low accountability, in particular the absence of electoral rights. As denizens are almost universally denied access to the national franchise, this means that all denizens are subject to this form of political domination in conditions where their exit costs of leaving the state and of becoming citizens are sufficiently high. I will argue that for denizens who are members of powerful states there are other, indirect methods

whereby state power is checked. However, even in the case of these privileged groups of denizens, once they have passed a certain level of dependence the accountability gap constituted by their lack of national political rights becomes problematic. Hence all denizens are vulnerable to state domination.

This chapter will also identify different, more acute forms of domination that some groups of migrants are vulnerable to in their private relationships. These forms of domination are by no means unique to denizens, indeed one of the main indicators of vulnerability to domination that I identify here is poverty, shared by citizens and denizens alike. Non-citizen status is not responsible for the vulnerability to domination in these cases, however, it may exacerbate it because of the role played by liability to deportation. Migrants who wish to remain in the state at any cost because of the risk or loss associated with leaving it are more likely to remain in dominating private relationships if they see their continued residence in the country as dependent on them. The threat of deportation is a significant source of power individuals have over certain types of denizens, including irregular migrants and those on temporary visas. This type of domination might also be amplified by denizen status as governments are not forced by the mechanisms of representative politics to intervene to regulate these relationships. There are therefore two interlinked but distinct problems of domination in relation to denizens. One is unique to denizens and stems from their political status, but is likely to vary considerably due to the different circumstances of denizens. The other is specific to vulnerable groups of denizens, and may be shared by disadvantaged citizens, but is likely to be exacerbated by denizen status.

I: The Domination Framework and Indicators of Vulnerability to Domination

In the last chapter, I developed a framework for identifying vulnerability to domination. On my account, an individual is dominated to the extent that they are dependent on a relationship of power, to the degree of strength of the power, and to the extent that the power of interference is unaccountable. I posited that we should speak of ‘vulnerability to domination’ rather than domination *per se*, due to the epistemic barriers to measuring the components of domination. In this section I will say more about how we can establish vulnerability to domination despite these obstacles and identify the kind of indicators the framework suggests we should look out for.

My approach throughout this chapter is of applied political theory; I do not engage in conceptual analysis of the components of domination, but assume that the domination framework has been established. My approach here is also non-normative; I do not discuss how we could remedy the domination of denizens, nor do I elaborate on why domination is bad. It should be relatively clear to most readers that it is, but I will leave it to the next chapter to examine the normative questions of why domination should be reduced, whether the domination of denizens (as well as of citizens) should be reduced (and to what extent), and what policies might reduce domination. The descriptive task of this chapter is of applying the domination framework to the case study of denizens and the

subsidiary case studies of different groups of vulnerable denizens, hence it will involve examining observable evidence.

Empirical evidence plays an indirect role in domination theory because domination is *structural*, what makes a relationship one of domination is not how its features play out in terms of outcomes (Lovett 2010: 43-7). Domination need not result in direct, observable exploitation or abuse in order to be harmful, indeed domination theorists emphasise how power configurations trigger more subtle effects such as self-restraint and uncertainty. As domination is structural, in order to determine if a person or group is vulnerable to domination we need to demonstrate that the components of domination obtain to a significant degree. Hence we need not establish that it results in certain outcomes. Nevertheless, empirical evidence can serve several purposes. First, it can provide evidence of the existence of the components of domination, for example of the dependence levels of particular groups. Second, evidence of the 'direct' outcomes of domination - such as abuse, exploitation, manipulation or coercion - alongside the components of domination would provide support for the framework. Although there is unlikely to be a strong relationship between indicators and outcomes, we need only show that indicators *sometimes* create these results, as it is the possibility that a system *can* lead to these effects, rather than that it does in a certain number of cases, that makes it domination. Empirical support for the framework is therefore provided if a particular set of circumstances leads to outcomes of domination in *any* number of cases, from one to 100 per cent. The final role of empirical evidence pertains to the fact that indirect outcomes are said to emerge from vulnerability to domination even in the absence of actual arbitrary interference. It is the fact that those affected are dependent on arbitrary or unaccountable power, rather than how this unaccountable power is used (whether for good or ill) that causes certain effects. These outcomes include uncertainty and an inability to plan one's life (Pettit 1997: 86, Lovett 2010: 132); a loss of self-respect (Lovett: 132-133); deference, self-denial and 'strategic anticipation'; the sense of having an 'inferior social status to that other'; and having to 'bow and scrape' (Pettit: 87). We would therefore expect to find evidence of these effects even if a dominating relationship is not malevolent.

These observations allow us to set down one theorem and two hypotheses which will guide this discussion. The theorem derives from the structural character of domination. It states that someone is vulnerable to domination to the degree that they are subject to the components of domination. Thus this theorem establishes that the 'proof' of domination will be provided by identifying indicators rather than supplying evidence of certain outcomes. The first hypothesis is that for groups that display significant levels of the indicators of vulnerability to domination we would expect to find at least some evidence of the direct effects of domination, including abuse and exploitation. If this hypothesis is not borne out, we might therefore be inclined to revise the domination framework. The second is that for groups that display significant levels of the indicators of vulnerability to domination, we

would expect to find fairly consistent evidence of the indirect outcomes of domination including insecurity and loss of self-respect, and so on. However, this latter conjecture is problematised by the limitations of proving psychological and subjective patterns. For one thing, it is unlikely that people will be willing to report such experiences, as they are delicate and personal. Second, they may not have identified the fact that their situation is characterised by insecurity and loss of self-respect if they have ‘adaptive preferences’, or if their perception of the alternatives to the situation they find themselves in is negative (in which case their situation may appear relatively good). Because of these problems, it is by no means clear that we will find blanket evidence of the indirect effects of domination. We can therefore revise the hypothesis as follows: for groups which display significant levels of the indicators of vulnerability to domination, we would expect to find some evidence of the indirect effects of domination to the extent that studies are reliable and available. For both these hypotheses then, the expectation of empirical evidence is fairly weak. It serves to support and illustrate domination rather than constituting a central proof.

In order to be able to determine if someone is vulnerable to domination, we need to know how to measure the components of domination, and what constitutes a significant element of each of the components. The main currency of domination is power: specifically, the power to interfere with another agent. This ‘power-over’ or ‘social power’ definition of power makes measurement more difficult than it would be for ‘power-to’ – defined as the ability to achieve a certain outcome. This is because much of power-to is likely to be measurable by considering the attributes and resources available to a particular agent (for example the power to read or to add up), whereas social power by definition is a function of social relationships and the broader social context. Nevertheless, we can assume that the same resources and attributes that constitute power-to will form the basis for power-over. These include power that derives from positions of authority, natural endowments including physical strength, intelligence or attractiveness, social resources including social capital, standing and networks, financial and material resources including money, rare goods and property, and access to information, language, skill and technical knowledge.²⁰ These are all likely to increase the extent to which an agent is able to say ‘I can interfere with another’.

These constituent elements of power translate into social power to the extent that they are not moderated by the social environment the agents operate in, including the rules and laws that operate within it (Lovett 2010). A very strong person has more power of interference over people she comes into contact with in a “state of nature” than someone with equivalent strength in a state where an assault conviction receives a prison tariff. This is because the exercise costs of the interference – assault in this case – are higher under the rule of law. But neither these basic ‘power resources’ nor

²⁰ This list is adapted from Pettit (1997)

social environment imply an exact science in measuring power. Someone's disposition may make the exercise costs of assault much higher if they have an aversion to violence, and someone who is indifferent to incarceration will not view the possibility of legal punishment as an exercise cost. Power is further influenced by the power resources of the would-be interferee. If this agent seems relatively powerful then the exercise costs for the would-be assailant are higher. Moreover, even if they do not seem powerful (but actually are) the power of the would-be interferer to make threats is reduced. In all three of these components there is therefore a tension between the objective exercise costs of interference and the subjective exercise costs of interference. Power seems to be a function of both, but because we cannot measure subjective exercise costs, it seems reasonable to infer them from the objective exercise costs.²¹ Measuring power is therefore unlikely to be precise, but we can make fairly reasonable approximations based on the relative power resources held by different actors in relation to one another.

The next question is: when does power becomes relevant for domination theory? That is, when does it reach a significant level or extent? There are three possible answers. The first is that power is relevant for domination theory when there is a significant inequality of power between two or more agents (Lovett 2010), the second is that power is relevant when it has a bearing over a wide range of choices, and the third is that power is relevant when it has a bearing over relevant choices (Pettit 2008b). The problem with the first is that there may be large inequalities of power that do not really matter. A bouncer of a nightclub has a huge amount of power over who enters the club, what sort of clothes they should be wearing, what people can do in it, and when they leave. However we would not wish to describe the club-goers (or would-be club-goers) as dominated. Pettit's answer would be that the clubbers are not subject to power over sufficiently important choices; their interest in clubbing is not a basic liberty. Lovett's (2010: 49-54) defence of his emphasis on inequality of power would observe that the reason why clubbers are not dominated is that they are not dependent. This is a richer characterisation of why the clubbing scenario is not domination. It is not just that clubbing is not a relevant choice, but that the clubbers could simply go to a different club. If we imagine that instead of a club, we are talking about the doorman of a homeless shelter which dishes out food to those who would otherwise go without, we can see how two different issues arise. A homeless person may not be dependent on a particular shelter for a meal if there are several different shelters nearby. Although the shelter doorman has a large degree of power over the homeless person's basic interest in sustenance, which is surely a relevant choice, the homeless person's domination is lessened by the existence of other options. If it were the only homeless shelter in the city, this would surely be more

²¹ Moreover, this has the advantage of being over-inclusive. It is better to include too many scenarios as instances of domination than too few. In the scenario of the Gentle Giant I discussed in the last chapter, who is 'self-checked' by his benevolent disposition, it would be better to have laws against the Giant in case he were to sustain a brain injury, or in case his twin brother the Grumpy Giant were to enter the scene.

dominating. The ‘power plus dependence’ approach is therefore preferable to both the ‘range of choices’ and the ‘relevant choices’ approach as it integrates the core intuition of ‘relevant choices’ – that a homeless shelter doorman is more dominating than a nightclub bouncer – but sets it against the context of alternative options.

However, Pettit’s concept of the scope and locus of choices subject to power is still relevant – in determining *dependence*. Because Pettit does not have a conception of dependence, the intuition that domination increases to the extent that an agent has no other option has to be integrated into his conception of power. I prefer, following Lovett, to identify a separate component of dependence, for the reasons outlined above. However, dependence and power are clearly interrelated and cannot be easily separated. Power increases to the extent that dependence increases – if a would-be dominator knows that the other cannot leave, their exercise costs of perpetrating interference are lowered as the risk of flight of the power-subject is reduced. Dependence has three important features. First, it is a function of the *subjective exit costs* of leaving a particular relationship. Second, dependence is a function of more than just the social relationship one is subject to; if the exit costs of leaving a particular relationship are low, but prospects are equally dismal elsewhere, the choice is between several similar relationships rather than between the dominating relationship and no dominating relationship (Lovett: 2010). Third, exit costs are likely to be the sum of several different features of the relationship. These include whether basic interests are met by the relationship, what alternatives are available and the extent to which they would meet basic interests, what fears or harms are inherent to these alternatives, and whether there are any external constraints on leaving the relationship.

The combination of dependence and power therefore gives us a clearer picture of the sort of power relationships that we should be concerned with. Specifically, they are relationships where the power subject is highly dependent (where the costs of leaving are sufficiently high to make leaving one of the last options the power-subject can or would take) and where the power is asymmetrical (where there is no mutual dependence or balance of power so one agent can interfere with the other much more than vice versa). Of course, the world is characterised by vastly unequal power relationships with high levels of dependence. Indeed, such relationships are often seen as facilitative rather than restrictive. Key institutions such as education, public administration and the media would all be impossible without power inequalities and dependence. Imbalances of power exist in the domestic sphere between family members and landlords and tenants; the interactional market between creditors and debtors, service providers and recipients; the employment sphere between employers, line managers and employees; the legal sphere between police officers, lawyers, judges, suspects and convicts; public service provision between housing officers, social workers, dole officers and those who rely on them, and the political sphere between ministers, executive, representatives and constituents at local, federal, subnational or national level. In addition to these micro relations of power, the broader power of the

state to collect taxes and impose legislation - in comparison to the relative powerlessness of individual citizens to do these things - constitutes the most unequal of power relationships. All of these situations entail high levels of interaction, influence and asymmetry. If we see these relationships as valuable, we need to specify the conditions under which they are so, and which ones contribute to domination.

The classic distinction in domination theory is between the power of arbitrary and non-arbitrary interference. Pettit (1997: 55) emphasises that it is the controls and checks on power that determine the extent to which it is non-arbitrary, but that such controls must be designed to fulfil the substantive goal of making interference 'track the interests' of those affected. This means that we cannot examine an act of interference alone to determine whether it is non-arbitrary, it is non-arbitrary through institutional design. That evaluations of Pettit's conception of arbitrariness have focused on the conditions under which interference can be said to be non-arbitrary, rather than on the procedural checks of power, suggests this distinction has been insufficiently accentuated (see Chapter 5 for an analysis of these critiques). Therefore, I suggest that we distinguish between checks on power, which I term accountability checks, and the principle against which they are evaluated, tracked interests.

As detailed in Chapter 5, institutional accountability forms my account of the different ways in which power can be forced to track interests. Accountability mechanisms are systemic questions asked of the exercise of power in order to ensure that it is used in the right way. The idea is that we should not only identify and regulate bad sorts of power but also make unequal power relationships subject to accountability mechanisms. The ideal of accountability is that there are institutional checks on the question of tracked interests. In Chapter 5, I identified three types of accountability mechanisms. The first pertain to *justification*: all those affected by the exercise of power ought to be included as relevant moral units in the decision-making of the power-holder. The second group of mechanisms derive from the principle of *contestation*: all those affected by power ought to be able to appeal the exercise of power that they consider to impact negatively on them. The third sorts of checks are related to *retribution*: violations of the substantive principle of tracked interests should be held to account, and if appropriate, duly punished. Power is accountable to the extent that there are built-in mechanisms to ask these questions, *not* to the degree to which the questions are answered in a positive way. So it is not enough for everyone to be considered in a particular decision made by lawmakers if the mechanisms that require it are very weak.

Accountability mechanisms work in two related ways. The first is directly, for example where citizens are given the opportunity to advance their views in the process of a public consultation on a particular policy or where an individual or group brings a landmark court case. The second is indirectly, and relates to the knowledge that power-holders have about the existence of such accountability

mechanisms and the self-restraint they are likely to exercise in response. This has much in common with the political idea of ‘anticipated reactions’ – government action is constrained by the predicted response of public, parliamentary and judicial institutions and influence is therefore unobservable (Friedrich 1968). Contestation is the most direct of accountability mechanisms as it is necessarily initiated or activated by the person subject to the power. However, the existence of contestation mechanisms and mutual awareness of their existence on the part of the power-holder and power-subject means that the power holder is likely to curtail their behaviour accordingly, thus it has an indirect character. The other two mechanisms can be administered by different agents (e.g. through the criminal justice system) and are likely to have both direct and indirect dimensions. Laws against assault do not keep people safe by locking up offenders each time they strike, but by informing would-be assailants of the social unacceptability and consequences of assault.

The weakness of accountability is in specifying when it can be said to be sufficiently absent to constitute domination. As no system is perfect, we are likely to always be able to identify ways in which power can be made more accountable. There is no point at which we are able to say ‘this power is accountable’, so it is more accurately described as a relative term. We can say that system A is more accountable than system B, or system A is more accountable than it was 12 months ago. However, this can also be seen as the strength of the concept of accountability as it has the potential to underpin reform and refinement even of established or effective institutions. Moreover, its imprecision need not preclude its ability to identify domination, provided we have clear enough account of when accountability is *absent*. We can either do this by defining a threshold after which accountability obtains, or by identifying what would constitute an ‘accountability gap’. I am inclined to think that it is possible to identify a certain threshold after which accountability exists. However this may not be necessary for our purposes as it is likely that we will be able to demonstrate vulnerability to domination on the basis of the idea of an accountability gap –where one or more of the accountability mechanisms are absent, negligible, or ineffectual. As the remit of this chapter is to define clear examples of domination rather than make broad recommendations about constitutional design, I will adopt the strategy of identifying accountability gaps for our purposes.

I have argued that to identify vulnerability to domination we need to look for the following indicators. First, an unequal power relationship, second, a high level of dependence, and third, an absence of one or more of the accountability mechanisms. We can now turn to the case study of this chapter, migrants who lack citizenship of the state they live in, to examine whether these indicators obtain.

II: The Vulnerability of Denizens to Domination

Like citizens, denizens are subject to the vast power of the state over taxation, legislation and coercion. There are, in fact, few ways in which the state has power to interfere with citizens alone – in effect, conscription, jury service, and the duty to vote in countries with compulsory voting. The power

to impose these sorts of interference on denizens is limited because of the high risk of international disapproval and diplomatic pressure. There are, however, powers the state has over denizens that it does not have over citizens. These are the powers the state has to transform the status of denizens: through detention and deportation (in essence, forcibly transforming non-citizen residents into non-citizen non-residents); denying or granting visas; or by granting citizenship. Of these, only detention and deportation can be said to be interference, but I mention the others in order to demonstrate how the state holds transformative power over the status of migrants, which, we will see, is significant for their susceptibility to different forms of domination.

The dependence of denizens is more complex. Besides the subjective character of dependence and its associated measurement problems, dependence is also the result of multiple factors. There is also an interplay between the exit costs of leaving the state, and the exit costs of leaving denizenship. To demonstrate that non-citizens are subject to domination, because they are highly dependent on unaccountable state power, we would have to show first that non-citizens are highly dependent on leaving the state, and second that they are highly dependent on remaining non-citizens (because their costs of naturalising are high).

The exit costs of leaving a state - for citizens and denizens alike - are highly subjective. Factors that influence someone's attitude to migration include the alternatives available and perception of their attractiveness (including social networks and employment opportunities in other countries and special connections such as nationality or citizenship of other states); attachment to life in their state of residence (including relationships, networks, health needs, education participation and long-term contracts such as mortgages); and the psychological make-up of the individual (including their readiness to take risks, travel and live independently). Because of the complex nature of dependence, we cannot straightforwardly say that citizens are dependent on their state of citizenship in a way that denizens are not. An elderly person who has a close network of family and friends built up over several decades, few connections overseas, and with health needs that are currently being met by the National Health Service is highly dependent on remaining in their state of residence regardless of their citizenship status. On the other hand, someone in their mid-twenties with high employment potential wherever they move to and no children might find it easy to 'up sticks' even if they had lived in their country of citizenship all their life.

Moreover, these factors are likely to affect the subjective exit costs for migrants in different ways. First, financial costs including the cost of passage, administrative costs and the cost of lost earnings will have differential effects –for those living on the bread-line, the cost of returning home or moving elsewhere may be prohibitively expensive. Some migrants incur debts to smugglers or family members in the process of the initial migration which they may have not yet paid off. Emotional costs are more

subjective – some people find it easy to live in different countries as they adopt a cosmopolitan approach to new cultures, others may find it painful to live away from home. The attachments that people develop to their place of residence depend on a range of factors from their attitude to work, relationships with their community and neighbours, personal relationships, and cultural factors. Migrants are by definition those who have already left their home country, so it is possible that they are more likely to feel independent and detached. On the other hand, if the initial costs of migration were very high - for example migrants who have left children behind or undergone immense risk or cost in migrating – the costs of leaving may be high. Finally personal costs that are specific to each individual's situation are likely to have a great deal of weight. These might include health costs including special medical needs such as HIV positive status, or exit costs related to concerns about personal safety or persecution for refugees or people who left countries with high levels of civil unrest.

The dependence of denizens on remaining denizens is also difficult to determine. As described in Chapter 4, the costs of acquiring citizenship are a function of the requirements made by states, and the impact that these have on different migrants. Requirements include length of residence, language competence, giving up citizenship of other countries and civic knowledge. The impact of conditions for naturalisation is likely to vary. Financial costs may be prohibitively expensive for some but not for others, and having to give up citizenship of one's home country may completely rule out naturalisation for some migrants, and be viewed as only a minor sacrifice by others. Determining dependence on denizenship is also complicated by the dependence of migrants on different types of immigration status. One of the problems with being an undocumented migrant is that there is no easy exit from this status. Some temporary work visas specify that they will not make migrants eligible for residency.

Like dependence, accountability is likely to vary substantially between and within different groups of citizens and denizens. However, unlike in the case of dependence there is a sharp distinction between citizens and denizens. This is because denizens are ineligible for national political rights, including the right to stand for office and vote in elections. At the most basic level, the risk of being thrown out of office makes a government responsive to its electorate. The policies that it develops are therefore forced to include all potential voters as relevant interest-holders (justification), and if a particular interest group are ignored they are likely to vote against them (retribution). In democracies where citizens have more direct influence through citizen juries, public consultations on legislation, the right to give evidence to parliamentary committees and so on, democracy also entails mechanisms of contestation. This is simplistic, and in practice the webs of accountability are much more complex. The executive is held to account internally by its broader political party, 'backbench' representatives, local party members and constituents, parliamentary committees and opposition parties, which are in

turn are responsive to different interest groups and factions. External to politics, the web of accountability is sustained and strengthened by the way in which the media exposes and criticises unpopular policies including articulating the views of interest groups. Although none of these accountability mechanisms are perfect and there are clearly accountability gaps and disproportionate political influence in all democracies, the accountability gap in relation to denizens is much starker.

Put simply, without voting rights, politicians lack the incentive structure to respond to the interests of non-citizens. Policies which favour migrants can be unpopular, as Edgar (2004: 15) puts it: 'Persuading parliamentary decision makers, who have an eye to their constituents and the next election [...] is fraught with difficulties'. Governments are under pressure to 'crack down' on immigration such that immigration become a matter of 'political calculus' and increasingly draconian yet ineffectual policies are introduced (Cornelius and Tsuda 2004: 41). This leads to two potential areas of domination which correspond to the two areas in which interference is said to be legitimate (and non-freedom-reducing) for domination theorists – justified state power of interference, and mandated state interference in private power of interference. First, interference in the form of taxation and coercive laws will be potentially dominating in a way they are not for citizens. The argument made by domination theorists is that state interference is not dominating if it is responsive to or forced to track the common good. Here, the common good is for some, not for all. The second potential area of domination is negligence. The second point about interference made by domination theorists is that it is mandated in cases which would otherwise be dominating; state interference can facilitate the freedom of individuals in their private relationships. Without the motivation to respond to their non-citizen population, private relationships of power they are subject to may be left unregulated, in an accountability gap.

Nevertheless, there are accountability mechanisms denizens have access to and additional accountability mechanisms specific to denizens. First, denizens are protected by human rights frameworks to the extent that they can bring cases against their states of residence, and because violating transnational human rights norms would lead to international disapproval or sanctions. Second, the states where denizens hold citizenship may exert diplomatic pressure to hold the host state to account, and take a case to the International Court of Justice. Third, migrants may be represented by pressure, ethnic or religious groups, employment unions, and may form interest groups along with migrants who hold citizenship who mobilise in the public sphere. If migrants are members of a wider ethnic or national group, some of whom are active, voting citizens, they might have political support, as in the case of politicians proposing amnesties for irregular migrants to court the 'Hispanic vote' in the United States. Finally, the media is a double-edged sword. Clearly it takes a lead role in 'exposing' immigration-favouring policies, but media stories also often expose injustices and raise the profile of migrant problems.

Again, there are wide variations in the extent to which these accountability mechanisms are effective for different groups. First, human rights accountability mechanisms are only as potent as the sanctions behind them, which are rather limited. However, to the extent that human rights norms are incorporated into domestic legislation, such as with the Human Rights Act in the UK, legislatures bind themselves and thus make themselves accountable to enacting legislation that jeopardises the rights of denizens. In such a way, human rights treaties and domestic legislation contribute to a culture of respecting the rights of denizens. The more direct aspect of accountability is less evident; the ability to bring cases against governments is limited by the extent to which migrants have access to legal aid, their immigration status and therefore their inclination to bring their case to the attention of authorities. Undocumented migrants are liable to experience a ‘chilling effect’ on their enjoyment of their human rights due to their status (Weissbrodt 2008), and even in states subject to the European Court of Human Rights, undocumented migrants have had only limited success in bringing cases. For more on the gaps in the rights framework, see Chapter 3.

The extent to which accountability is promoted by diplomatic protection also varies significantly. It is determined to a large part by the individual’s country of origin. Migrants from states with a strong diplomatic presence and political ties to their state of residence are less vulnerable as their home states would and could intervene if their rights were endangered, including providing legal assistance and mediating in labour disputes (Maher 2004: 137). Diplomatic protection extends to citizens of all countries that are signatories of the 1963 Vienna Convention on Consular Relations. However, even in these cases, early interpretations of the Vienna Convention established that states only had a right to provide diplomatic protection to their citizens abroad, not a duty, and it is therefore dependent on states’ own practices and interests.²² Second, diplomatic protection depends on the country of origin’s *powers* of intervention. The United States has a strong presence abroad and is well able to intervene, in a way that states with a weaker claim on the international stage cannot. For example the Philippines and India tried to get minimum wages agreed for their citizens working in Gulf states in 2007 and 2008, but were dismissed as having no authority in the Gulf by the Bahrain Minister of Labour (Castles and Miller 2009: 279). It is also a matter of state’s *inclination*. Some states are unwilling to jeopardise economic gains if they rely on foreign aid and migrant remittances (Maher, 137). The limits

²² Recent decisions of international courts have, however, provided a further element to the interpretation of the right to consular assistance guaranteed by the Vienna Convention: individuals have a right to receive consular assistance from the state of their origin if they so wish. In an advisory opinion provided by the Inter-American Court of Human Rights to the United Mexican States on October 1, 1999, the Court held that article 36 of the Vienna Convention confers rights upon detained foreign nationals, including the right to information on consular assistance. Similarly, in two landmark cases, the International Court of Justice held that article 36 of the Vienna Convention confers on individuals the right to contact their consulate and receive consular assistance. *LaGrand (Germany v United States of America)* [2001] I.C.J. Rep. 466; *Avena and Other Mexican Nationals (Mexico v. United States of America)* [2004] I.C.J. Rep. 12.

of ‘external citizenship’ as Bauböck (2009) calls it extend more widely than mere diplomatic protection. States that benefit from sending high numbers of migrants have even been reluctant to ratify rights treaties such as the ICMR for fear of losing jobs for their citizens (Ruhs and Martin 2008). As Castles and Miller (2009: 279) contend, ‘[t]he acquiescence of homeland governments’ means that ‘the costs paid by migrants are often very high in terms of work accidents, exploitative employment conditions and highly regimented, segregated housing arrangements, usually devoid of family life.’ The political system of country of origin and policy on expatriate voting is also a significant factor here; immigrants whose homelands are democracies that permit absentee voting are likely to put pressure on their governments to further their interests.²³

Finally, the extent to which governments have to take account the interests of migrants as members of wider groups also differs widely. Castles and Miller (2009: 281) observe that migrants have historically been poorly incorporated into unions. However, Soysal (1994) argues that migrants mobilise to constitute ‘claim making populations’ who advance claims in the public sphere. Migrants – including undocumented migrants – often join local or ethnic associations including self-help institutions, churches, formal and informal religious groups, sports clubs and leisure centres which organise political actions, public demonstrations and strikes (Kemp et al. 2000). Migrant associations provide social services and ‘community care’ – they may focus on specific tasks like managing housing projects or training programmes, or provide a range of social services and cultural and recreational activities. Despite this, Soysal (1994: 104) found that in Britain few migrant associations were involved in large-scale policy advocacy or development. Migrants’ access to political activity has been dependent on the country in question and political context. For example, foreign residents in countries including Sweden and Switzerland have been restricted from speaking on political issues in open or private meetings of associations without authorisation (Hammar 1990). Even to the extent that they are permitted, migrants might be scared to draw attention to themselves if they protest or mobilise; particularly if they wish to acquire citizenship or have undocumented migrant status. Moreover, migrants with high financial clout are likely to exert more influence on these associations than relatively poor migrants. Denizens who constitute interest groups, for example those employed in the financial sector, or well-off denizens who contribute funds to political parties, also exert higher levels of accountability over public institutions.

The dependence of denizens on unaccountable private relationships of power is likely to be

²³ This similar point, about the impact of a situation where the host country is much stronger internationally than the home country, is made by Lisa García Bedolla (2005) who applies a Lockean framework to the question of noncitizen voting in the United States. If immigrants receive the protection of their home country they raise no problem for a Lockean consent framework because consent implies reciprocity internationally. She gives the example of Mexican nationals on death row and executed in the United States. There is little recourse on the part of the Mexican government, thus these nationals are de facto stateless.

influenced by the factors identified above. First, the lack of incentive to promote the interests of denizens may lead to a regulation gap in relation to certain sorts of activity which may contribute to the extent to which employers, for example, wield power over migrants. Second, the exit costs of leaving the state for denizens may contribute to the power employers have over them. High dependence of certain groups of migrants on remaining in the country means that they are willing to accept non-ideal employment terms. Even if they are not dependent on a particular employer – for example if there are numerous opportunities for employment in certain industries – an exploitative culture can develop. Lovett (2010: 52-54) contends that dependence is more than just the social relationship one is subject to. If the exit costs of leaving one relationship are low, but the prospects equally dismal elsewhere, the choice is between several similar relationships rather than between the dominating one and no dominating relationship at all. An empty choice between multiple dominating ‘masters’ – say equally exploitative employers – contributes to lower levels of domination for a migrant who has high employment potential if they return home compared to one who has no opportunities in their home country. Third, to the extent that the exit costs of leaving the country are high, the power of employers, landlords and so on to threaten migrants with deportation or manipulating their immigration status is higher. This is particularly significant for undocumented migrant workers for whom employers wield large amounts of power over their continued residence in the country. The threat of deportation – even if not substantiated by any ‘real’ power the employer has – can be used to extract long hours or extra work.

Despite the skewed nature of policy-making which may promote the interests of citizens over denizens and the associated risk of negligence, it would be going too far to suggest that private power relationships are unregulated in liberal democracies. Long-term legal migrants in particular receive a range of employment and social rights, and all migrants and visitors, including those who are undocumented, receive the full protection of the law. However, accountability mechanisms on the exercise of private power including employment rights and regulation may be ineffectual for many migrants. A recent study of the meat industry in Britain found that it was ‘not because the legal, licensing or ethical standards for agencies and firms are generally too low’, but because a culture of exploitation and abuse is enabled by the high proportion of migrant workers who accept such conditions because they feel they have no choice, are not aware of the rights they hold, or do not understand documents they are given due to their lack of linguistic competence (Equality and Human Rights Commission 2010). Undocumented migrants who do not wish to call attention to themselves may be disinclined to report crimes committed against them.

From these observations, we can identify a list of factors which increase vulnerability to domination, or ‘vulnerability indicators’, to examine in more detail in the case studies section :

1. *Immigration status*. Different types of visas facilitate different relationships of power and dependence

between employers and employees. At the extreme, irregular and undocumented migrants are subject to higher levels of dependence upon their landlords, employers, and social networks as they have fewer alternatives. If their exit costs of leaving the state are also high the power to threaten them with deportation is vastly increased.

2. *State and citizenship of origin.* Euro-denizens or ‘super-denizens’ – those who receive the protection of supranational citizenship rather than just the external citizenship of their home country – have much stronger accountability mechanisms, including the protection of EU institutions, local political rights and European courts. Those who have citizenship of states with a strong presence on the international stage such as the United States are similarly relatively well off in terms of accountability. Migrants from countries which benefit from migration or who have little diplomatic influence are more vulnerable. Refugees – de facto stateless – have no external protection of their home state. Dependence is also affected by state of origin. Those who fear returning to their home country due to civil unrest, famine, fear of individual persecution and so on, even if they do not qualify as refugees under the Geneva Convention, have much higher exit costs for leaving the state.

3. *Length of residence.* This contributes significantly to dependence, but as we have seen the dependence of denizens on the status of denizenship falls as their dependence on the state rises through length of residence, if they are eligible for citizenship after a certain number of years. This is dependent on how effective their access to citizenship is.

4. *Wealth.* Richer migrants have significantly more political influence, both because states wish to attract and keep them, and because they can contribute funds to political parties regardless of their citizenship. They also have much lower dependence on the state as they can afford the cost of migration elsewhere. They are much less likely to be dependent on exploitative employment relationships.

5. *Language, skills and education.* Those who understand the system and are able to speak the language are likely to be much less vulnerable to domination. Migrants who are less skilled are more vulnerable to exploitation as they have less bargaining power and so higher dependence on individual employers or on exploitative industries. Highly skilled migrant workers are in high demand so countries tend to ‘bid’ for them by offering them beneficial arrangements.

The analysis above gives us good reason to think that denizens are vulnerable to domination both as a group, and to the extent that they display the vulnerability indicators. Moreover, the framework demonstrates that the distinction this chapter began with between the super-denizen and the marginen is not as clear-cut as it seems. The framework predicts that undocumented migrants, asylum seekers,

refused asylum seekers who have not yet been deported, temporary workers and so on are among the most vulnerable. However, it also shows that other factors are significant. Some denizens might display some indicators of domination but be relatively well off on others, as in the case of highly skilled migrants from poor or politically weak countries, or unskilled workers from the United States.²⁴ As length of residence increases, the accountability gap for all non-citizens becomes more problematic, because dependence increases. On the other hand, to the extent that length of residence decreases dependence on denizenship because it makes access to citizenship easier, dependence will remain fairly constant.

There is also a more persuasive reason for thinking that non-citizens are vulnerable to domination as a group. This is that domination may be more than the sum of its parts for denizens; in other words, the domination they are actually subject to may be higher than the components above may suggest. This is because of the subjective dimension to domination, where power, dependence, and the effectiveness of accountability mechanisms are all heavily determined by inclination, knowledge and perception. The existence of an accountability gap, however small, is likely to grow and lead to further increases in power and dependence. This is because non-domination is full citizenship in the sense of full incorporation 'into a framework that guards those basic liberties against the control of others' (Pettit, 2008). Once it is a matter of mutual knowledge that non-citizens have only partial incorporation, then they lose their bargaining power, security and ability to participate in interactions as equals. Non-citizens are of course definitionally second-class members. However, examining the intuition about second-class membership in a more detailed way demonstrates why it might be harmful even if it is protected to a certain degree by rights. If everyone is aware of the fact that denizens are protected to a lesser degree by the institutional framework of the state, then their vulnerability becomes a self-fulfilling prophecy as employers, landlords become aware of this and of their ability to exploit; migrants become aware of their inferior status and are less likely to report crimes or bring court cases or go to their MP with problems, and a culture of inflicting negative or burdensome policies on migrants becomes normal and then expected and echoed in political parlance and the media. This supports Pettit's claim that citizenship is a 'badge of security'. Without public affirmation and assurance of the independence from unaccountable power of denizens, the status of being a denizen becomes a badge of vulnerability. This process is likely to be fuelled by the negative characterisation of immigration in the press and the cultural norms that this engenders; for example 'asylum seeker' has become a term of abuse in Britain.

Furthermore, I want to suggest that vulnerability breeds vulnerability to the extent that we can identify 'vulnerability clusters'. For particularly marginalized and disenfranchised groups, certain vulnerability

²⁴ Thanks to Sarah Fine for pressing me on this point.

indicators increase the susceptibility of migrants to other vulnerability indicators. I hope to demonstrate this point with my case studies, the subject of the next section.

III: Case Studies

In the last section, I examined how the components of domination were likely to manifest themselves in denizens, and identified indicators of vulnerability to domination. In this section, I consider four case studies of groups of non-citizens in order to explore in a more systematic way how these indicators play out in practice. To return to the hypotheses I set out in the first section of the chapter, the domination framework suggests that in the presence of indicators of domination, we would expect to find some evidence of direct exploitation and abuse, and some evidence of the more subtle impact of domination such as loss of self-respect, adaptive preferences and uncertainty. In order to explore the way in which these hypotheses are supported, the structure of the case studies will take the form of analysing the presence of the components of domination, and then examining evidence for the impact of domination, in terms of direct and then indirect impacts.

Case 1 - Domestic care workers

Comparisons between domestic care workers and slaves abound, hence it is an obvious place to start in demonstrating the links between the theory of domination and real world migration practices. One recent example of this comparison is an article that appeared in the Sunday Times in February 2010 which reported that diplomats at London embassies had been accused of using migrant domestic workers as ‘modern-day slaves’. The same article cites other features of these cases that resonate with the domination framework. The first is the retention of passports by the employer and threats associated with immigration status. The second is liability to abuse with impunity – ‘In another case, a nanny said she was sexually assaulted by a diplomat and his wife. Police said her employers could not be prosecuted because they had diplomatic immunity’. The third is the use of visas which allow migrant workers to work only for diplomats, which blocks their ‘escape route’ and facilitates, in the words of the chairman of the all party group on the trafficking of women and children a ‘modern form of slavery’ (The Sunday Times 2010).²⁵

Beyond this quite specific case of diplomats’ employees, concerns about slavery are often voiced in relation to domestic care workers. Anti-Slavery International has taken on campaigns for the rights of domestic workers emphasising its slavery-like features; the power to buy and sell, the practice of exercising ownership over another human and the power of control over the most basic freedoms of the person. Examples of the sorts of conditions such workers live in echo the classic republican

²⁵ See also the recent news story ‘Diplomatic staff in London ‘commit serious crime’ which describes serious offences including human trafficking committed by people with diplomatic immunity in London in 2009 (BBC News Online 2010).

example of slavery. Domestic workers are described as being at the beck and call of their employers and subject to their control over basic functions such as when they sleep, who they speak to, and what they eat and drink. Moreover, the attributes of the type of work involved such as always being on call or having ill-defined hours sit at odds with the ideal-type of the free, rights-holding worker. These examples are at the extreme, but as I argued above, we need only find evidence of the fact that the structural framework domestic care workers occupy enables such abuse to demonstrate vulnerability to domination. Of course the situation experienced by domestic care workers differs widely, and experiences are to some extent a product of each country's law and policy. We therefore need to identify what indicators of vulnerability are shared in order to establish more definitely whether domestic care workers can be described as a 'vulnerability class'.

Turning first to power, there is a significant asymmetry between the social power of employers and domestic workers. Employers are likely to be financially better off, have better local language skills, know how the 'system' works and have power from their position as employers. There are reports of employers keeping their workers inside the home by saying it is dangerous to go out. For example Zarembka (2003) reports of black domestic care workers being told that Americans hate black people in order to keep them house-bound. Other studies emphasise how employers can threaten employees with deportation even when they have no control over this, i.e. in situations where the employee has legal status (Anderson 2007). This information power can moreover be manipulated by the employer if they restrict access to televisions and newspapers and thus is likely to be greater in 'live-in' situations. Comparatively, the worker has very little social power. The worker's only power is to withdraw their labour, but this is only possible if they are not highly dependent on staying with a particular employer.

Power is therefore also implicitly connected to dependence. The interplay between dependence on the state, and dependence on a particular employer, is especially significant for domestic care workers. First, they are likely to be poor and to have dependents at home; indeed wishing to send remittances to their families at home often provides the impetus for the migration. The financial costs of deportation would therefore be very high. On the other hand they are less likely to have developed deep social existences in the host state, especially in the case of 'live-in' workers. Dependence is likely to be much higher for undocumented workers, or for those on visas which tie employees to a particular work situation. For example the Canadian live-in domestic workers policy prevents workers from being able to change employer without leaving the country or being forced into illegality (Carens 2008b), and in the UK employees of diplomats do not have the right to seek employment elsewhere. The practice of keeping employees' passports – unique to domestic care work – further increases the dependence of workers on employers.

The degree to which these power relationships are unaccountable is less directly observable. The rhetorical comparisons between domestic workers and slaves belies the fact that employers, unlike traditional slave-owners, do not act with impunity. Employers' actions are governed by criminal and civil law; it is for example illegal to assault employees or to withhold payments from them. However, the specific scenario of domestic workers in the private sphere culture means they are often invisible to authorities. A culture where domestic workers are expected to regularly exceed their contractual duties may undermine the effectiveness of accountability mechanisms. Again, undocumented domestic workers are particularly vulnerable – for example in the US criminal but not civil charges can be brought against employers by those without legal status (Zarembka 2003). Lack of legal status impedes access to legal aid and the fear of deportation means that migrants are disinclined to draw the attention of authorities.

Therefore domestic workers seem to score highly on all the components of domination. Turning to the evidence of the impact of domination, this seems to be reinforced. Evidence of exploitation is found not just in interviews with care workers themselves, but with employees and recruitment agencies. The ILO's study of domestic workers found that their vulnerability and 'invisibility' derives from the attributes of the workplace. They cite evidence of long hours, practices such as spot checks of living quarters by employers, restrictions on visitors, control over the use of the worker's spare time, and 'general inadequacy of the living space to provide for privacy and separation between the employer's family and the domestic worker' (International Labour Office 2003). Anderson cites evidence of commodification and exploitation including implicit acknowledgement on the part of employers of the fact that these relationships constitute exploitation. For example the practice of agencies charging different prices for different nationalities treats workers' nationality like a brand – indeed employers in interviews talked about 'picking one up'. This facilitates and reinforces a culture of exploitation as it allows employers to feel entitled to control the 'whole being' of a worker rather than giving them their contractual dues. It also breeds abuse: '[t]his feeling of entitlement or ownership underlies many of the specific kinds of abuses domestic workers tend to face, from employers who make claims on their bodies, to those who regulate what workers eat and where, to those who make workers virtual captives in the house with no freedom of movement or social contacts' (Anderson 2000: 143). She also finds evidence of abuse, including violence and sexual abuse.

Anderson's study also draws direct links between the individual features of domestic care workers' situation and the vulnerability to abuse and exploitation. She argues that those who are undocumented and "live-in" 'are particularly vulnerable, since they are dependent on their employers for accommodation, must be permanently available, and, should they come to the attention of the state, are liable to be deported' (48). Along with those whose continued legal status ties them to a particular employer, Anderson found that undocumented migrants were the group most likely to suffer abuses.

Moreover, employers exploit immigration status for their gain; in later work, Anderson (2007: 261) cites interview evidence of employers who prefer undocumented migrants because they work harder as they are frightened of deportation, and of employers grumbling about the change to the labour supply post-EU enlargement because au pairs from accession states can now leave and find another job.

Evidence is even more compelling in relation to indirect effects of domination, due to a practice which Rollins (1985) has described 'maternalism', where (usually female) employers wield power over their employees by helping them rather than hurting them. This is where employers feel they are acting kindly and protectively towards their workers, yet care for them as they would a child or a pet, reinforcing the 'superordinate-subordinate relationship'. Examples include the use of the term 'girl', presenting days off as a kindness rather than a right, and exercising control over accommodation, communication and food in the name of the interests of the employee. 'So power is clothed in the language of obligation, support and responsibility, rather than power and exploitation' (Anderson 2007: 254). This is an interesting case as it demonstrates when a relationship can be dominating without directly contradicting the interests of the employee. Even if the employer casts themselves as benefactor or educator and has the employee's interests at heart it can lead to indirect negative effects. This example of what Lovett calls 'benevolent domination' provides a useful hard case test of the domination framework as it demonstrates how domination can fulfil the criteria to be defined as domination without being 'bad'. The key question then, and one which is significant for the discussion about domination-inspired policy approaches, is whether we should always wish to reduce domination even if it is not 'bad'. Lovett's (2010: 145-147) response, which he develops in response to paternal domination, is convincing. He contends that it is not the domination inherent in the parent-child relationship which makes it valuable but the other dimensions of love, care, education, protection and so on. These benefits outweigh the cost of domination. Therefore all things being equal, we would wish to reduce domination by reducing the arbitrary power inherent to these relationships. This point is even more compelling in the light of the 'maternalism' case because the dominated subjects are adults. Even if the interests of domestic workers are being promoted by such relationships we have a negative intuitive reaction to the infantilisation of adults.

The undocumented status of domestic workers seems to be one of the most significant indicators of domination. Therefore, it is worth exploring undocumented workers as a case in itself, in order to see the different ways in which status makes migrants vulnerable to domination, and outside of the working place.

Case 2 - Undocumented migrants

As with domestic workers, the language used by immigration scholars to describe the situation of

undocumented migrants resonates with the language of domination. Gibney (2000) describes it as 'outside most if not all of the usual protections of the state and its agents', which calls to mind the insecurity and uncertainty that domination causes, and says 'people with irregular migration status must ... rely on their own wits and means or on the assistance of non-state authorities', evoking the criteria of dependence and low accountability. The term 'undocumented migrant' covers those who have never been given leave to enter a state, those who entered fraudulently, those who obtained valid leave to enter but breached the terms of their admission for example by taking up employment on a tourist visa or overstaying. Gibney explains that many legitimate migrants may become *de facto* illegal if they mislay their documentation or make a bureaucratic mistake and find themselves with inadequate documentation. That there is not a definitive line between 'legal' and 'illegal' migrants is one of the reasons why undocumented migrants are worth considering in depth despite the complex and unique moral conundrums that they raise. Moreover, undocumented migrants demonstrate the interplay between dependence and accountability in a way which is worth examining – for example, it is interesting to note that, according to Gibney, many of the reasons individuals give for wishing to overstay student visas is that they have established ties, contacts and connections in the country, or that they feared returning home, in other words, that their exit costs of leaving had become sufficiently high.

Dependence of undocumented migrants on the state is broadly similar to the dependence of other groups of migrants. Like them, it is likely to be a function of the amount of time they have spent in the host state, and the degree of connections they have built up. One difference is that unlike legal residents, undocumented migrants have much higher exit costs of leaving the status of being undocumented – in fact it may be effectively impossible. Legal residents on the other hand may have a right to acquire citizenship after a certain period of residence, so their exit from the status of denizenship, although time-dependent and possibly costly is feasible (see Chapter 4 for more details). Moreover, for unrecognised, *de facto* refugees who fear returning home, dependence is particularly high. Interviews with this group in Germany found that these people had a more secretive and vulnerable existence than undocumented labour migrants as their fear of being deported led them to avoid public situations and get anonymous work (Gibney 2000). The reasons for being undocumented and the relative costs attached to returning home are likely to be responsible for substantial variation within the group of undocumented migrants.

Dependence of migrants on private power relationships is also evident. First, because of their limited access to public housing, irregular migrants are heavily dependent on landlords in the private sector and specifically on ethnic communities and informal networks which can provide them with accommodation (Coutin 2000). Their vulnerability here is summed up by Gibney (2000): 'In a vulnerable situation, enjoying few of the protections official residents take for granted, irregular

migrants are often met with generosity by private individuals and charitable organisations. But this generosity is a matter of charity, not of right. In many circumstances, the undocumented face egregious exploitation in the housing market; exploitation that, because of their rightless situation, they lack lawful means of correcting'. Their weak bargaining situation, constituted by no alternative options, makes them vulnerable to the exploitation of landlords. Second, because of their status migrants are forced to seek work 'off the books'. This means they are working without the safety net of unemployment benefits or redundancy packages, which increases their dependence as it means not having work is no option. High dependence on employers increases the risk of abuse, as well as exploitation, especially in agricultural sectors where workers are required to live in rural settings: 'Physically isolated from the main urban centres, separated by language from those around them, and dependent upon their employers for language and food, these workers are highly vulnerable to exploitation' (Gibney 2000). Debts incurred to smugglers, family members or community networks increase the pressure on migrants to take less than desirable or risky jobs.

Undocumented migrants have severely curtailed access to accountability mechanisms. They have no right to join unions, and can only rely on informal membership of interest groups. If someone commits a crime against them, they are effectively unable to bring this to the attention of the police without risk of deportation (Coutin 2000). As Gibney (2000) puts it, they are 'deprived of a public stage on which they could express their grievances' as '[r]aising awareness of their experiences is usually tantamount to advertising their own illicit status'. They are also subject to discretionary power in multiple spheres of their lives. If there is a culture of 'turning a blind eye' to certain groups of undocumented migrants, as in parts of the United States, this means that migrants can access public institutions but depend upon the goodwill of officials not to report them (Mahler 1995).

The direct effect of exploitation is most easily observable. States that implicitly encourage undocumented labour often do so because of the benefits it confers on those who use it at the expense of the workers. The undocumented status of workers itself increases their value to employers and their input into the economy because their labour is priced below market rate and they have no claim to employment or social rights. De Genova (2002) argues that it the deportability of migrant workers makes their labour a commodity. Or as Castles and Miller (2009: 68) explain, '[s]ome employers prefer undocumented workers, because they can be easily exploited, while governments may like them because they fill labour needs without the need for difficult political decisions on legal migration policies'. The relationship between dependence and powerlessness and vulnerability to exploitation is also clear. One example is the notary industry in the US that blossomed around the Immigration Reform and Control Act which imposed sanctions on employers or undocumented workers. Notaries advertised themselves as immigration specialists to exploit the fact that undocumented workers thought notaries were attorneys as the Spanish word for attorney is *notario*

(Mahler 1995). It is not only employers who therefore take advantage of undocumented migrants.

The indirect effects of domination are also clear. The first is insecurity or anxiety; interviewees characterise their lives as full of ‘uncertainty and unrest’. Gibney (2000) argues that the reality of being apprehended ‘occupies the minds of all people with irregular migration status. No amount of experience or success as a mini-cab driver can quell the anxiety that a routine stop by the police to check one’s driver’s license will end with a request to view one’s passport in order to verify immigration status’. Constant fear of surveillance in all spheres of life preoccupies undocumented migrants and constrains their access to opportunities (Mahler 1995). We can also observe adaptive preferences – immigrants become appreciative of even menial, dangerous or badly paid work if it means they can stay in the country, and uncertainty over relationships. Gibney says that ‘[t]he stigma of irregular migration status casts a shadow over all these relationships, even if the shadow cast is slightly different in each individual case’. Being an undocumented migrant is the antithesis of citizenship, indeed it has been likened to a ‘form of civil death’ (Benhabib 2004: 215).

Case 3 – Refugees and asylum seekers

In Britain, refugees encompass those granted asylum on a temporary basis (five years in the first instance), refugees with indefinite leave to remain, those with humanitarian protection or discretionary leave to remain, asylum seekers, and failed asylum seekers. Each of these represent different levels of vulnerability, just as different categories of migrant do. This section will focus on asylum seekers – rather than refugees granted asylum – as they demonstrate interesting features of the domination framework. Refugees granted asylum are in a relatively good situation, compared to this group. However, some mention will be made of failed asylum seekers, and of refugees granted leave to remain.

The dependence of asylum seekers on the state is beyond doubt. For those who have legitimate claims, the exit costs of leaving the state would be extremely high, as returning home would constitute persecution and possible death. Even those whose claims do not fall under the Geneva Convention, for example individuals who have fled a general situation of unrest, dependence may be high. Even ‘bogus’ asylum seekers are likely to have high exit costs for leaving the state; seeking asylum is not an enjoyable process and it is likely that only fairly desperate individuals are driven to such a situation (although this is not to endorse the submitting of fake claims). The dependence of asylum seekers on private relationships is also evident. Research demonstrates that asylum seekers are often highly dependent on informal social and ethnic networks for support, as well as on lawyers, public officials and charities. They are also highly dependent on their relationships with landlords, but for a different reason – because they have no choice over their accommodation, in the UK at least.

The state's power of deportation and detention mentioned earlier is exercised mainly over failed asylum seekers. This casts a different light on the theory of domination because it suggests that the interference of being removed from the state is a significant power. As we have seen, the fear of deportation and dependence on the state makes for vulnerability to domination. However, it can also be seen as a harm *in itself* to the extent that it is a form of unaccountable interference. Arbitrary internment is generally seen as a significant abuse of power, however it is used routinely for failed asylum seekers. Conditions are often bad including heavy-handed and aggressive techniques. Moreover, the reliance of asylum seekers on legal aid, as they are ineligible to work, means their access to accountability mechanisms is only as good as the legal aid provision in their area. Asylum seekers whose applications fail are only entitled to legal aid if their cases have over a fifty per cent change of winning.

The most easily observable impact of such vulnerability to domination is on the self-respect of asylum seekers. Practices like granting vouchers identify asylum seekers as lower status and damage their sense of self-worth. The self-respect of asylum seekers is further impeded by the treatment of officials – for example studies have found descriptions of the infantilisation of asylum seekers including calling grown men 'boy', and treating asylum seekers as if are criminals. Not being able to work further impedes self-respect and sense of self-worth, as it makes subsisting dependent on other individuals. Moreover, the 'culture of disbelief' which characterises the treatment of asylum seekers as criminals or liars send a clear message that asylum seekers are worth less than citizens. Being a failed asylum seeker has been described as a 'subhuman status' (Gower and Liisanantti 2007: 15). Uncertainty is also evident, as asylum seekers are, of course, by definition in limbo. Studies have found that even refugees granted Exceptional Leave to Remain find their lives characterised by uncertainty as they feel unable to form lasting relationships, cannot take out mortgages, or plan their careers (Dwyer and Brown 2008). Inconsistent benefits, poor housing despite promises to fix it and misinformation are among the complaints made of public officials, which build up a picture of dependence on the goodwill of public workers. One healthcare professional who they interviewed said 'the asylum application process has been described to me as another form of psychological torture whereby asylum seekers are treated as objects rather than people' (Gower and Liisanantti 2007: 3).

Case 4- Dependent women

The vernacular of domination also emerges in studies of migrant women's vulnerability to abuse by their partners. Anitha (2008: 194) describes how 'patterns of abuse can be attributed to an imbalance of power between the perpetrators and the women, an imbalance exacerbated by the immigration laws which leave women with very few viable alternatives, thus reinforcing the patriarchal structures within their communities'. Women are vulnerable in the migration process for several reasons. Male-centred immigration laws, mean that women are often pushed into illegal work and immigration status. For

example in Germany the four means of entry for labour entrants are aimed at men and men constitute 80 per cent of these (Maher 2004).²⁶ Women may also be the target of additional anti-immigrant sentiment because concerns about migrant fertility and benefit strain are targeted towards them. Moreover, women are often tied to their husband's status or nationality and therefore lack permission to migrate unaccompanied (Brysk and Shafir 2004). The case of women on spousal visas who suffer from domestic violence at the hands of their partners shares many of the characteristics of the situation of abused domestic workers. Again, immigration status, isolation and location in the private sphere coalesce into high dependence on unaccountable power, which translate into risk factors for abuse. Again, it is the way in which dependence, low accountability and power map on to one another which renders women vulnerable. As Narayyan (1995: 105) puts it, immigrant women face a 'constellation of forces' that makes them vulnerable to abuses. These are a combination of dependence on the relationship with their partners and the low levels of recourse available to them.

Dependence and the effectiveness of accountability are heavily intertwined for some migrant women whose reasons for not leaving the relationship are also reasons for not utilising available accountability mechanisms. Some ethnic minority women are less likely to report domestic violence because they of their 'fear of bringing shame to their families and communities or of reinforcing stereotypes' (Kasturirangan et al. 2004: 321). Women from certain South Asian communities are disinclined to report violence due to stigma, fear of ostracisation from family and community networks, isolation and feelings of shame, guilt and fear at jeopardising the marriage prospects of sisters (Anitha 2008). At the same time, the dependence of these women on their marriage may be higher, for example if their families have paid large dowries or divorce or separation is culturally unacceptable. Immigration status compounds the dependence of women. In both the US and the UK, women on spousal visas are subject to a two-year probationary period which means they that they have to return home if they leave the relationship within this time. The different types of dependence intersect and amplify one another. If women would have to return home to their families who have invested financially or emotionally in their marriages, their exit costs of leaving abusive relationships are very high.

Accountability is also affected by the policy framework of particular states. In the UK, a new concession allowing dependent partners to apply for Indefinite Leave to Remain (ILR) if they have been the victim of domestic violence was based on the acknowledgement that migrants are particularly vulnerable to domestic abuse. However, the policy demonstrates the way in which ineffective accountability mechanisms can render people vulnerable to domination. Until a decision is reached on their ILR dependent migrants are ineligible for public funds, but a condition of their applying for ILR is that they have to demonstrate that they have sought support from public services

²⁶ These are project-linked employment, guestworkers, seasonal workers and commuters (Maher 2004).

or charities. Women are required to 'prove' that they have experienced domestic violence, yet have limited access to service providers (Anitha 2008)

Research indicates that the power of threatening deportation, whether or not it is founded, can be used for exploitative purposes. On recent study reports findings from interviews with women married to British citizens who were expected to act as live-in servants, and threatened with deportation if they did not please their husband and/or their husband's extended family (Anitha 2008). Another, US-based study finds similarly that '[d]ependent immigration status is often exploited by husbands, who use the threat of deportation to ensure that their wives do not leave or seek assistance when abused' (Narayan 1995: 109). Partners may also refuse to apply for leave to remain as a means of wielding power by pushing women into insecure immigration status.

IV: Conclusion

This chapter has applied the conception of domination I developed in my last chapter to the case study of denizens, and then to individual case studies of vulnerable groups of migrants. In the first part of the chapter, I examined how we can identify significant levels of the components of domination. In the second part of the chapter, I considered how these might play out in practice for denizens, and identified 'indicators of domination', factors that increase vulnerability to domination. In the third part of the chapter, I examined four case studies of vulnerable groups of migrants with high levels of these indicators of domination. For each, I examined evidence of the direct and indirect effects of domination and found that there is widespread evidence of the vulnerability of these groups to abuse and exploitation, and of the indirect effects of domination such as uncertainty, loss of self-respect and strategic anticipation.

The advantages to viewing immigration issues through the lens of domination should therefore be clear. First, it provides us with a language to express the specific grievances of migrants. Pettit (1997: 131) claims that he hopes that by developing the idea of domination he will introduce 'a medium which enables those in every quarter of the society to give a satisfying articulation of their particular grievances and goals'. Indeed, domination seems to provide a coherent way of articulating the problems faced by migrants, in that it brings together the idea they are vulnerable to a chain of abuses and are powerless, and complaints about lacking choice and control and the experience of insecurity, volatility and uncertainty in the immigration process.²⁷ It also coheres with the observations of various immigration scholars on fair and unfair policies towards migrants. For example, Carens' (2005a, 2002, 2000) argument that the longer someone lives in a country, the more of a claim they have on fair treatment and/or citizenship, is supported by my framework. All else being equal, the longer someone

²⁷ See e.g. (Edgar et al. 2004) for a book-length treatment of these sorts of concerns (but not presented in domination terms)

has lived in a country, the more they have to lose from having to leave it. The domination framework also supports the arguments made by commentators who emphasise the extent to which immigration status is a predictor of vulnerability (Edgar et al. 2004, Martiniello 1994). On my account, all else being equal, status makes for higher dependence and lower accountability. Finally, my theory fits with the observation made by democratic and immigration theorists alike that it is not particularly morally problematic or onerous to deny ‘transients’ certain rights, because of their very low exit costs (Gubbay 1999).

The most significant finding of this chapter has been the crucial role that immigration status plays in determining vulnerability to domination. This should not surprise republican theorists: the core idea of non-domination is of a resilient, institutionally secure status that is equivalent to full republican citizenship, although thus far the connections between citizenship as relationship with the state and formal citizenship as nationality or immigration status of a state have not been adequately explored. This chapter has argued individuals are vulnerable to state domination without formal citizenship of their state of residence. However, this vulnerability is unlikely to translate to a reality for most well-off non-citizens from liberal democratic states, as there are numerous other ways in which the state is forced to track their interests. This chapter has also argued that other types of immigration status – such as undocumented status, and temporary residency – are more significant in determining liability to domination than ‘denizenship’ in general.

It would therefore be going too far to suggest that denizenship is a status of domination. It is a risk factor (due to the absence of political rights), but one amongst many other types of group membership. The susceptibility of certain subgroups of denizens to private forms of domination is however, more acute. This is not caused by their denizen status, but may be intensified by it due to the power constituted by the threat of deportation. Denizenship status therefore makes a difference through vulnerability to state domination, and through vulnerability to exacerbated private domination. I have argued that we should see denizenship as a whole as problematic if certain conditions obtain, specifically there are limited accountability mechanisms and denizens’ exit costs of leaving the state and leaving denizenship are high. However, because the private forms of domination I have highlighted here are not caused by denizenship status, the problem is much more complex. It may therefore require targeting policies to specific groups rather than to reducing the domination of denizens as a whole.

Before the success of different policies vis-à-vis one another can be assessed however, we need to consider the preliminary question of whether we should reduce the domination of denizens. This will rest on the answers to three questions. First, the sort of good that non-domination is, and the extent to which its promotion requires trade-offs between different groups. Second, whether we should

count the non-domination of denizens as worth the same as the non-domination of citizens. Third, what difference it should make that in some cases the domination denizens are vulnerable to is a matter of their own choices, or is consensual. This is particularly problematic for the case of undocumented migrants, who may not have had the country's consent to enter or may have overstayed the terms of their visa. Finally, we need to consider what to do to reduce domination and promote non-domination, and the extent to which this should be a matter of targeted policy, or of institutional design. These questions will be considered in the next and final chapter.

Chapter 7 - Reducing Domination in Immigration Policy

In the last chapter I argued that denizens – resident non-citizens – are vulnerable to domination, the state of being dependent on power that can be wielded arbitrarily, or power that is subject to insufficient accountability checks. I said little, in the last chapter, about why domination is a bad thing or about how it could be reduced. Also absent from Chapter 6 was any discussion about whether non-citizens are *entitled* to non-domination, in other words whether non-domination is the sort of ideal that governs relations between *denizens* and the state, rather than just *citizens* and the state. This concluding chapter seeks to address these questions. My main argument is that the non-domination of denizens has equal moral weight to that of citizens, but that because non-citizens generally have lower exit costs of leaving the state, securing their non-domination often depends on fewer rights and protections. I will also outline a package of proposals for how ‘non-dominated denizenship’ could be achieved. In particular will I identify four areas where non-domination could inform policy: improving the accountability of states to their non-citizen population, empowering denizens in their private relationships, reducing domination in immigration policy and reducing arbitrariness in citizenship acquisition. The suggestions outlined here are quite general, and further work would be required to consider how they could be implemented in practice. The objective is to outline some of the features of a non-dominating immigration policy approach, rather than present a policy blueprint.

The chapter is split into four parts. In Part I, I present an argument for why we should value and promote non-domination. In Part II, I construct a case for according equal weight to the non-domination of non-citizens and citizens. In the third part of the chapter, I outline the policy approach that the goal of non-domination could inform, and I identify different categories of policies that could be adopted. In the final part of the chapter I evaluate the contribution made by my thesis as a whole. Notwithstanding some noteworthy objections, I hope to have provided a novel approach to immigration theory of interest to political philosophers, political scientists and policy-makers alike, and to have cast new light on the rich potential of republican theory.

I: The Good of Non-Domination

In Chapter 5 I examined the republican concept of freedom as non-domination, and I argued that an individual is dominated to the extent that they are dependent on a relationship of power, to the degree of strength of the power, and to the extent that the power of interference is unaccountable. In Chapter 6 I identified ‘indicators of domination’ for denizens, and described some scenarios where domination might materialise. In this section, I once again set aside my case study of denizens to show why domination is the sort of thing we should reduce. I identify four benefits of reducing domination: it increases your sphere of choice, it allows you to protect yourself from harms, it promotes self and mutual respect and dignity, and it reduces anxiety and insecurity and thus facilitates

the forming of life plans. In the next section, I consider why a liberal state should promote the non-domination of denizens.

The first reason why people have an interest in less domination is that it means a larger and more firmly protected sphere of choice; if you are not dominated you have more choices at your disposal, and you can approach them as *your* choices, not choices you have to make through another, or at their discretion. Domination, as Thomas Wartenberg (1990: my emphasis) explains, constrains your ‘action environment’. Non-domination enables you quite simply to do more, but crucially you also do so within a protected action environment. Moreover, what is protected is what is *significant*: the non-dominated person is one ‘who is systematically protected and empowered against alien control in those choice-types that are deemed significant in social life’ (Pettit 2008a: 103). The ideal of non-domination is not just the privation of domination but a threshold or status after which a certain level of non-domination obtains. As these ‘choice-types’ are those deemed ‘significant in social life’, non-domination is not merely a large action environment, but an important one. Being able to make relevant choices (even if one chooses not to) is core to living a decent and autonomous life as it enables you to make life plans.

The second value of non-domination concerns self-protection: it enables an agent to safeguard themselves from various harms. Non-domination is the ‘power of the agent who can prevent various ills happening to them’, in Pettit’s (1997: 69) words. This has two dimensions, first, that the agent is in fact protected from the harms, and second that he or she can initiate the protection. These harms include exploitation – the extraction of social goods from those subject to the power relationship – and abuse – the direct injury that is possible when agents stand in a dominating relationship to one another. It is self-evident why these are the sorts of things that should be reduced. But controlling your own protection is also crucial as it makes it more resilient – it is guaranteed, not dependent on another’s mood or disposition.

Thirdly, non-domination nurtures self-respect and dignity. Domination is likely to lead to personal debasement, flattery, fawning and toadying or currying favour because of the sort of behaviours avoiding interference requires. Those subject to a relationship of domination exercise self-restraint, self-censor, and make anticipatory moves to avoid the wrath or repercussions on the part of the powerful (Scott 1990). But these moves also have a more significant, indirect effect – they symbolise and consolidate the inferior status the dominated occupy. Domination means having to cast one’s eyes down – indicating inferiority, deference, and recognition of the knowledge that others have of this second-class status. Deferential behaviour reinforces hierarchies; as Alice Hochschild (1983: 90-1) explains, ‘to have higher status is to have a stronger claim to rewards, including emotional rewards. It is also to have greater access to the means of enforcing claims. The deferential behaviour of servants

and women ... comes to seem normal, even built into personality rather than inherent in the kinds of exchange that low-status people commonly enter into'. This is bad because it 'stands in the way of genuine fellowship or community with others, which at some level is predicated on a mutual recognition of personal worth' (Lovett 2010: 133). On the other hand, being non-dominated means being 'able to look the other in the eye, confident in the shared knowledge that it is not by their leave that you pursue your innocent, noninterfering choices; you pursue those choices by publicly recognized right' (Pettit 1996: 594-5). These 'intersubjective benefits' of non-domination involve seeing oneself as 'possessed of a comparable social standing with the other' (Pettit 1997: 87).²⁸

The fourth and final benefit of non-domination is the reduction of anxiety and insecurity. Straightforwardly, it means that 'I do not have to depend on my luck for avoiding the relevant sort of interference' (Pettit 1997: 69). Domination impedes one's ability to make life plans, which leads to 'overcompensating and taking evasive measures against these dangers', 'psychological anxiety and a sort of paralytic sense of helplessness' including 'social withdrawal: recognizing the improbability that even modest life plans will come to fruition' (Lovett 2010: 132). By contrast, non-domination allows people to make life plans without them being high risk or tentative. People living under non-domination 'do not have to live under constant fear of unpredictable interference, and so they can organize their affairs on a systematic basis and with a large measure of tranquillity' (Pettit 1997: 86). Non-interference is enjoyed resiliently and even 'in those nearby worlds where fortune or wit or charm fails' (Pettit 1996). It ought, therefore, to lead to a higher quality of life.

Having then, examined the 'why' question of non-domination, the next section seeks to answer the 'whom' question. Is non-domination a good the state should advance for citizens alone, or should we care – or even care equally – about the non-domination of denizens? I will contend that we should not only promote the non-domination of denizens, but we should do so on a par with citizens. This does not entail treating denizens and citizens the same, however, because of their different exit costs of leaving the state. In fact I want to suggest that their different exit costs can account for many of our intuitions in relation to the distinction between citizens and denizens. I put forward three arguments to support my claims: the argument from legitimacy, the argument from coherence, and the argument from implementation. Then I consider three objections: the objection from fairness (which has three forms – unfair to citizens, unfair to denizens, and unfair to non-resident non-citizens), the objection from consent, and the objection from benevolence.

²⁸ It should be noted that Pettit describes the subjective and intersubjective benefits of non-domination as the third benefit of non-domination distinct from the second benefit which is practising strategic anticipation and deference, while I prefer to see the former as the consolidation of the latter.

II: Promoting the Non-Domination of Denizens and Citizens

Given that domination is something that should be reduced, does it follow that states should take all measures to reduce the considerable vulnerability to domination of denizens as identified in the last chapter? One reason for being reluctant to jump to this conclusion is that freedom as non-domination was traditionally thought of as the preserve of the citizenry. Cécile Laborde (2010: 49) describes how for classic republicans, the ‘political condition’ of freedom ‘was seen to be possible only through practices of self-government, or ‘voice’, in a bounded political community’. Non-domination is often described as equivalent to citizenship, and citizens are considered its relevant subjects or beneficiaries. Thus Pettit (1997: vii) describes his early historical work as centred on republican freedom understood ‘as equivalent to citizenship in a republic’.

Contemporary republicans exclude denizens from their remit by focusing on the institutions of the state and seamlessly toggling from ‘individual’ to ‘citizen’. But it is by no means clear that they believe citizenship to be a necessary condition of non-domination. On the one hand, Pettit (1997: 6) speaks of the illegitimacy and outmodedness of the traditional republican view that believes non-domination to be ‘an ideal for an élite of propertied, mainstream males’. He claims we should ‘reappropriate their ideal and reintroduce it as a universal ideal for the members of a contemporary society’. On the other hand, Pettit (1997: 152) acknowledges that immigration may pose a security issue or a threat to non-domination, describing the republican state as one which will ‘need to maintain limits on immigration, if it is to retain its current republican character and if it is to sustain the republican ethos that that requires’. This implies that non-members might be antagonistic to the republican project, not beneficiaries of it. But these comments on immigration might be taken to imply border closure, rather than restricting goods of republican democracy to the citizenry. Moreover, it might be that Pettit would consider denizens to be ‘members’ and therefore appropriate beneficiaries of non-domination as this ‘universal ideal for the members of a contemporary society’.

I think there are three powerful arguments for considering denizens to be relevant members (and therefore for promoting their non-domination) implicit in or extrapolable from Pettit’s work. The first is that non-domination would be an illegitimate good if it was bought at the cost of the exploitation and domination of a sub-class of co-residents. The second is that non-domination would be an incoherent concept if it was understood as equivalent to citizenship. And the third is that the non-domination of denizens is less onerous than it first appears.

Promoting the domination of denizens: the argument from legitimacy

The argument from the legitimacy of non-domination is, I think, one that springs logically from Pettit’s description of the ethos of modern republicanism. I will contend that non-domination for citizens alone is unappealing and self-defeating because it undermines the case made by neo-

republicans to be inclusive, non-elitist, and sensitive to contemporary concerns. In this vein, Pettit (1997: 130-56) emphasises that his theory is compatible with multiculturalism, the green movement, and feminism. Although he does not consider the application of non-domination to immigration theory, the crux of his argument is that non-domination can no longer be purchased at the expense of minorities or outsiders. In a similar spirit, Pettit (1997: 139) argues that, 'the ideal of freedom of non-domination can have appeal for people who live beyond such boundaries' (sex, property or cultural boundaries). Pettit also endorses the view that institutions are legitimate by virtue of how they relate to those whom they *affect*, not just an inner circle of beneficiaries. For example, he says that selective internment would 'manifestly fail to track interests and ideas that are shared, not just by those whom they benefit, but also by those *whom they affect*' (112). The implication is that mismatches between beneficiaries and affectees are inherently suspect. State policies orientated towards the interests of citizens but affecting denizens would fall under this category.

In fact, the whole project of reviving republicanism would fail if it were found to rest on a 'status concept', as Robert Goodin (2003: 61) terms it. Goodin argues that republicanism is regressive, and harks back to a 'status society of a strikingly premodern form'. The rejection of traditional hierarchies is only possible by accepting the equality of status of 'the status of citizen' which is 'an empty a form of equality as is the equality of all who are of noble birth' (62). Goodin presents would-be republicans with the choice of either revising republicanism so that it does not rest on a status concept, or rejecting it altogether. He advises the latter, maintaining that non-domination as status concept is integral to republican theory. But the other choice is still open to us: if it can be shown that denizenship is compatible with non-domination, republicanism will have passed the ultimate test. This is not a straightforward argument for promoting the non-domination of denizens. It is a conditional argument that will only be convincing for those who are already sympathetic to republican views. The point is that *if* republicanism is to survive the challenge of commentators like Goodin, it needs to demonstrate that non-domination is not a privilege or honour.

Promoting the domination of denizens: the argument from coherence

The second argument questions how coherent non-domination would be if it were considered equivalent to citizenship. First of all, I want to argue that if there was a *necessary* connection between citizenship and non-domination, non-domination would lose some of its conceptual force. The epitome of domination in classic texts is slavery, and slaves were, of course, non-citizens. If slaves were dominated *by virtue* of being non-citizens, the description of the slave as dominated would have no force as an example. It makes sense to say that legislation governing the treatment of slaves would reduce their domination, and to describe citizens as more or less dominated. If citizenship *constituted* non-domination, and vice versa, this gradation would make less sense.

This does not yet rule out the possibility that citizenship might be a necessary condition of (rather than equivalent to) non-domination. The second point, however, might demonstrate why this should not be the case: because there would be a moral lacuna in regard to denizens. For theorists like Pettit (1997: 81), non-domination is the main, if not the only, value in the contemporary state. He maintains that non-domination is able to underpin all the institutions of the state and explain our main intuitions about other values like equality and fairness. If non-domination applied only to citizens, we would need another value to guide policy on other individuals residing in or visiting the state. Pettit (1997: 152) says little about this, but the fact that he is committed to at least a minimal normative approach to non-citizens is clear from his claim that republicanism ‘had better not show itself indifferent to the plight of immigrants and refugees’ (sic). If a minimal normative approach to immigrants is necessary, and Pettit believes non-domination underpins policies across all of society, it seems only a small leap to say that non-domination ought to guide this.

Promoting the domination of denizens: the argument from implementation

The third and final argument for promoting the non-domination of denizens is that it may not be as burdensome in practice as it seems in theory. Non-domination is a public good and trade-offs may be relatively rare by nature of the sort of good it is. Promoting maximum non-domination, for example, will rarely require adopting anti-equality policies because it is unlikely that the increase in non-domination of the better off would outweigh that of the worse off because of the law of diminishing returns: it takes more to effect an increase in non-domination in those subject to less domination (Pettit 1997: 114). Of course, if the goal is promoting the non-domination of citizens alone this argument does not hold. But much of what is necessary to ensure the non-domination of denizens will also be necessary to secure the non-domination of citizens. Pettit (1997: 68) contends that constitutional arrangements are justified because all subject to them have a ‘common interest in being protected from others in a constitutionally assured manner’. The benefits that denizens, as those who are subject to them, experience cannot be delimited easily. Take Pettit’s ‘empire-of-law’ condition that the system should ‘constitute an empire of laws and not of men’. This condition requires the fulfilment of Lon Fuller’s (1969) morality of law requirements of generality, transparency, nonretroactivity and coherence. It would be hard to isolate the application of these legal principles, and the practices of liberal states are generally committed to treating all those subject to the law equally - so fulfilling Pettit’s requirements for denizens is often a matter of course in any case. Access to other public goods like public transport, roads and infrastructure, high-speed broadband, police and security services, can also not be disaggregated. My argument is not that immigrants’ interests should be promoted over those of citizens, but that the idea of the ‘public good’ is not the common interests of citizens alone, but of all who live in a state.

The second reason why promoting the non-domination of denizens may not be significantly

demanding is that non-domination does not involve allocating all recipients the same goods, just as ‘treatment as an equal’ does not requiring ‘equal treatment’ (Dworkin 1977: 227).²⁹ The model of domination as dependence on unaccountable power allows for substantial variation in the dependence level of migrants, and hence different demands on the state. For example, the problem of democratic institutions being unresponsive to their interests, while deeply problematic for migrants who have lived in the country for decades or who have very high exit costs of leaving for any other reason, is much less troubling for new arrivals with a passport from a liberal democracy. To continue with the example of democratic decision-making, we might wish to say that there is a good case for granting denizens the vote once they have gone beyond a certain level of dependence, an argument I will make in the next section. But the point is that it is not the case that promoting the non-domination of denizens will require increasing accountability or empowering denizens indefinitely, or indeed just giving them citizenship from the offset. For the state to track the public good requires taking the interests of denizens into account, but the weight accorded to the interests of denizens that constitute this public good can legitimately be smaller for those with low exit costs.

I hope that these three arguments will persuade republicans, at least, that there is at least a good case for promoting the non-domination of denizens. But even if it is clear that the non-domination of denizens must be promoted by republican theorists, it still remains to be shown that the non-domination of denizens should be accorded equal value to citizens. It might be the case, a republican critic of my approach might say, that denizens are the appropriate recipients of a weaker version of non-domination. In response, I want to suggest that this observer should be *sympathetic* rather than *antagonistic* towards my model. The central place for the dimension of dependence in my framework is precisely to show that (at least some groups of) denizens will require less stringent state non-domination. The negative effects of *imperium* (state power) are diminished by the fact that individuals need not be subject to them – as they could move somewhere else or return home. Moreover, the negative effects of *dominium* (private power) are also mitigated by this ‘top level’ exit option in the same way, regardless of the specific exit costs of leaving the individual relationship. For example a migrant might have high exit costs of leaving a particular exploitative employer if they could not find work elsewhere, but the domination would be reduced if the migrant could find work in their home country as staying in the exploitative relationship would not be their only option.

There are, however, three objections that I need to consider. These should be relatively familiar: the first two because they are versions of arguments often rehearsed in the popular press and political discourse, and the last one to those who acquainted with the domination literature as it has been raised in relation to domination theory as a whole. I hope to be able to surmount all three: the fairness

²⁹ Pettit (1997, p. 111) also makes the connection between the ‘egalitarian commitment’ of non-domination and Dworkin’s principle that people should be treated as equals.

objection, the consent objection, and the benevolence objection.

The fairness objection

The fairness objection, in its simplest form, holds that citizens have contributed more to the state in taxes and time and therefore that it is unfair to extend the same benefits accorded to citizens to them. But, as I said before, valuing the non-domination of non-citizens alongside that of citizens will not mandate treating non-citizens and citizens equally in all situations, or indeed in *many* situations. As many non-citizens have recently arrived, and others may have low exit costs of leaving the state for other reasons as detailed in Chapter 6, their overall domination is lower. A non-domination framework may actually provide a solution to the contradiction that flows from commitment both to the principles that we should treat all individuals with equal concern and respect and the one that says that we should prioritise fellow citizens. Instead of being committed to these two apparently irreconcilable principles, a domination theorist would say that, in a situation of scarce resources, we ought to favour those immigrants who are highly dependent on the state in the same way as most fellow citizens. Many immigration theorists argue that long-term resident non-citizens should be treated effectively like citizens. Even those who wish to argue for the moral significance of citizenship see the claim to citizenship of long-term residents as very strong precisely for this reason. If dependence in fact *captures* the intuition that there is a distinction between citizens and non-citizens – because citizens usually have far higher exit costs of leaving the state than non-citizens – then the intuitions about long-term resident non-citizens are not an exception to this rule, but in line with the model underpinning it. The non-domination of citizens will generally require stringent protections, but the non-domination of other highly dependent residents will too.

However, the fairness problem may still arise, particularly in relation to refugees. As refugees have high exit costs of leaving the state, they are highly dependent. They have also not contributed to the welfare system and so the extension of benefits to refugees might seem unfair to some people. One response to this is a form of the classic objection to what Goodin (1988) calls a ‘mutual-benefit society’. We do not generally object when the benefits received by citizens outweigh what they have contributed, for example we think that the disabled should be entitled to certain goods just by virtue of needing them. The difference between our intuitions about someone who has crossed the border from the United States to Canada merely to take advantage of the free medical care and someone who is intending to live there permanently are very different. The concern is that people will cherry pick the benefits of the state rather than stick with it “through thick and thin”. My contention is that dependence can explain this intuition.

There are two other potential sources of unfairness. The first is that my model might lead to policies that seem unfair in the way they distribute resources between different migrants. Compare the

situation of the 'Disloyal Refugee' with the 'Loyal Super Denizen'. The Disloyal Refugee has very high exit costs of leaving the state, yet is completely unattached to it emotionally or politically and rejects liberal democratic principles. The Loyal Super Denizen on the other hand is a French citizen who has emigrated to the UK because he has such great admiration and support for British political institutions and culture. On my account, the Loyal Super Denizen will not be dependent in the way a citizen is for several years, and will have far greater access to accountability mechanisms, as detailed in Chapter 6, so would receive less in the way of resources. It seems unfair to provide more resources to the Disloyal Refugee than the Loyal Super Denizen. My hope is that to some extent this concern will be not be borne out in developing policies as these sorts of trade-offs arise rarely in practice, or where they do not in a way that diverges significantly from our intuitions about fairness. Moreover, this concern would be considerably allayed if the Loyal Super Denizen was entitled to naturalise after a certain period and thereby acquire all the benefits of citizenship. My view is that someone's claim to non-domination is completely independent of one's emotional attachment to the state, but that their loyalty and attachment are relevant to one's claim to citizenship, as I will argue in the next section.

The second additional source of unfairness concerns *non-resident* non-citizens. By including denizens in the sphere of citizenship, that is, of non-domination, are we merely replicating the status dimension of republicanism where being an insider is what counts? Bosniak (2006: 135) puts it thus: 'even if coresidents as well as compatriots are understood to be ethically privileged for us over territorial outsiders – the fact of *being* a coresident or a compatriot itself represents a privilege'. This is not merely a theoretical quirk, but has a clear bearing on a contemporary immigration debate. The tension between admitting more migrants, and extending more benefits to the ones who are admitted, has become a hot topic amongst immigration theorists. Ryan Pevnick (2009) for example advocates granting immigrants a thinner welfare rights package if it means that more migrants can be admitted, or at least that more migrants can be admitted legitimately – his view is that the narrower legal channels are, the more likely migrants are to seek illegal routes, and that this should be a pressing moral concern for liberal states. In a similar vein, Daniel Bell (2006) argues that insisting on equal rights for foreign workers reduces the numbers states are willing to admit. Ruhs and Martin (2008) have termed this the 'rights and numbers' debate. Using what limited political capital there is to push through policies to improve the position of denizens - those who have been admitted – seems wrongheaded and unfair to those who would gladly take any package liberal states offered.

It is true to say that republicans, like many liberals, have not seen global justice as a priority. Nevertheless, republican global justice is a burgeoning field, and republican principles are not incompatible with the concerns of global justice theorists. For example, Stuart White (2003) argues that it is part of the republican project to propagate non-domination as far as possible and that transnational solidarity is part of this, and Laborde (2010) argues that republicans should seek to

reduce ‘capability-denying domination’. It is not clear to me that these two goals – promoting non-domination globally and promoting the non-domination of denizens – are incompatible, although it is beyond the scope of this thesis to develop an account of republican global justice. Further, the obligation of states to their non-citizen population seems quite separate from either the global obligations of states or their duties to accept needy migrants. That states may or may not renege on one set of obligations if they fulfil another set is not itself an argument against the latter set of obligations. Carens (2008b), commenting on Bell’s argument, writes that normative theory is not an appropriate arena to weigh up what states are likely to do, because if these considerations are included at the point of principle we may lose sight of the fact that we are choosing between the lesser of two evils.

However, one might still question what it is about denizens that makes them entitled to consideration over and above non-citizen non-residents. I think the answer is clear. Denizens, like citizens, are subject to and sometimes highly dependent on the powerful institutions of the state. The state can restrict the sphere of action of resident non-citizens in a way it cannot for non-resident non-citizens, through the imposition of laws and regulations and the exercise of the power of coercion and taxation. Steps to promote non-domination that are in the state’s remit, responsibility and power because they pertain to the state itself therefore *must* be taken, and this does not impinge on the determination of global obligations – a question which unfortunately cannot be pursued here.

The consent objection

The second objection bears some similarities to the first in that it too is a philosophical version of a popular objection to migrants’ rights: by entering the state, migrants have consented to differential or inferior treatment. If they have freely signed up for it then there is no objection to providing them with a much thinner rights package, or, in my terms, not treating them as equivalent to citizens for the purposes of non-domination. Bell’s (2006) work discussed above also provides an argument in this vein: migrants should be able to choose for themselves whether or not they want to absorb whatever terms offered by a state, and insisting on certain rights undermines this choice. Will Kymlicka (1995: 96) has put forward a similar argument against equal cultural rights, immigrants occupy a different status to cultural minorities, as unlike the latter by choosing to immigrate they ‘voluntarily relinquish some of the rights that go along with their original national membership’.

The problem of consensual domination is not limited to immigration but domination theory more broadly: it seems wrong to overrule someone’s choices if they want to be in a relationship of arbitrary power. The problem is amplified in the case of denizens. They do not merely consent to private relationships of domination (such as exploitative employment), but also to the coercive power of the state. Moreover, this point connects to the objection above and makes it all the more forceful. Why

should someone, just by virtue of having succeeded in migrating when so many others do not, be entitled to full consideration in terms of non-domination when so many others would gladly take the opportunity with a much thinner ‘offer’?

Lovett’s (2010: 147) comments on consensual domination are particularly persuasive, and in fact he considers denizens as an example. ‘Sometimes, people agree to suffer under domination. For example, migrant laborers, who will inevitably find themselves exposed to the arbitrary power of their employers in the United States and elsewhere, nevertheless volunteer to work under such conditions’. Lovett contends that, generally speaking, people do not enter dominating relationships unless they have no viable alternatives: they face a ‘dismal choice scenario’ (148). Similarly, Pettit (1996: 585) argues that we should always aim to reduce domination, whether it ‘sprang originally from a contract or not, whether or not it was consensual in origin’. But what if someone chooses to gamble, or pursue short-term goals at the expense of long-term security? It would be going too far to say that this sort of choice was a forced choice into domination because of a dismal choice scenario. A simple version of this would be a poker player putting ‘himself’ – a life of servitude – on the table to match stakes that would mean a lifetime of wealth. The ‘dismal choice scenario’ argument clearly is not accurate here – for one thing, it is not the domination that is chosen, domination is merely risked against the alternative of a particularly fruitful gain. Second, the gambler does not face dismal choices, the alternative is folding – losing only his original stake. It is the potential gain that makes the choice to 1) gamble 2) worthwhile, not the existing situation that makes the choice to 1) enter domination 2) the only viable option. Most people would say that someone clearly cannot gamble themselves into servitude. But what of someone who chooses not to pay into a pension scheme despite having a lucrative job their whole life? If they found themselves destitute in their retirement they would be at the mercy of their children, dependent on favours from friends, and potentially vulnerable to exploitation. This, for republicans, would be sufficient justification for a state pension scheme even for those who had chosen to spend all their income each month rather than save it. But it would not be justification for allocating the same resources to the reckless spender as to the lifelong saver.

Similarly, if someone had a decent life but decided to migrate to pursue what they thought could be much greater opportunities, should the host state be obliged to compensate them if it turned out to be a “bad gamble”? Again, it is worth reiterating that promoting non-domination does not require granting denizens the same resources. In this example, they could simply leave if their gamble did not pay off, so their domination is not unduly high. On the other hand, if their exit costs are high then this suggests that they have no viable alternatives, so they had a dismal choice scenario in the first place – most people prefer not to migrate, after all. There is clearly a link between the exit costs of leaving the state and having a dismal choice scenario which means that what is required for non-domination varies according to the opportunities the migrant had as an alternative to migrating. It

does not seem wrong, therefore, to compensate migrants for bad gambles. Either they had no effective choice but to gamble, or they did have a choice so they could go back and pick another alternative. In the latter case, their dependence is low, and so what non-domination requires is undemanding.

The benevolence objection

The final objection to treating the non-domination of denizens as equal to the domination of citizens is that their domination may be a necessary feature of their transference from denizenship to citizenship, akin to the development of children into adults. In this vein, we might wish to say that the domination of denizens is unproblematic provided it is benevolent, that is, in their interests.³⁰

The children analogy seems particularly pertinent for denizens. After all, migrants are often portrayed as being taken in into the bosom of the state and rescued from a life that would probably be short, brutish and desperate. The metaphor of state as adoptive parent is encapsulated in the Statue of Liberty inscription: ‘Give me your tired, your poor; Your huddled masses yearning to breath free; The wretched refuse of your teeming shore; Send these, the homeless, tempest-tossed to me; I life my lamp beside the golden door!’ Again, this impression of giving migrants a better life than they would otherwise have had reiterates some of the concerns I raised in the first two objections. Many denizens will be much, much better off as a result of being accepted as residents of a liberal state, even if they are not beneficiaries of full non-domination. The difference here is that denizens are seen as appropriate beneficiaries of non-domination, but the domination they do experience is seen as less problematic than it would be for citizens because it is inevitable or in their interests. The logic of the benevolence objection would therefore have us say that state power is only problematic when it is not wielded in the interests of immigrants. It would also imply that the resources of the state should be devoted to acting in the interests of migrants whatever this implies in terms of domination or non-domination.

Once again, Lovett’s (2010: 145-7) response to the benevolence objection (for children) is illustrative for denizens. Lovett contends that the objection misconstrues the location of the ‘good’ in benevolent domination. It is not that the domination itself is good, but that the care relationship provided by the parents is in spite of the domination; the benefits outweigh the costs. Therefore, reducing the domination, if at all possible, would be a good thing. It is surely better to protect the rights of children and obligations of parents in law and convention. Similarly, liberal states may – and in many cases do

³⁰ Others have noticed the so-called paradox of benevolent domination and argued that this means we should revise our conception of domination so that relationships of dependency and care do not fall under its scope. For example Marilyn Friedman (2008) and Thomas Wartenberg (1990) both suggest that we should adopt a more limited conception of domination as the actual exercise, rather than the mere existence, of arbitrary power.

– treat denizens well and promote policies which further the interests of migrants. But if they are not forced to track their interests through various accountability mechanisms, migrants are vulnerable to domination, just as children in a society where children's rights were not promoted. Pettit's (1997: 120) writings on this are similar: he says that parents and teachers should be subject to constraints and the possibilities of sanctions to assure that they advance the relevant interests of children.

All of these three objections are forceful, but ultimately not fatal. However, there are some outstanding questions to address, notably in relation to undocumented migrants, and I hope to integrate some of the more compelling concerns I have identified in developing a policy approach. In the next section, I examine four areas where non-domination can inspire policy: accountability, empowerment, immigration policy, and citizenship acquisition.

III: Outlining a Non-Domination Inspired Policy Approach

What is the appropriate role for non-domination in immigration policy development? Like Pettit and Braithwaite who develop a theory of domination-minimising criminal justice, I see the potential of non-domination in inspiring an approach for policy-makers rather than prescribing individual policies. Pettit and Braithwaite (1990: 86) describe their project as a 'research programme for normative thinking about criminal justice issues... a policy heuristic, though not a policy algorithm'. We cannot know exactly how non-domination will be played out without knowing about the existing framework and relative resources, and little of this can be developed by political theorists. I therefore attempt to show the sorts of measures that policy-makers should adopt to reduce domination, rather than dictate precise policies.

The main obstacle to outlining a domination-reducing approach to immigration is that policy-making entails making broad judgements about particular groups rather than responding to individual circumstances. In Chapter 6, I argued that groups of denizens were likely to have vastly different levels of domination due to vulnerability indicators, and that the domination within these groups was also subject to different degrees. This suggests that policies should be tailored to different levels of domination, which would be hugely complex and cumbersome. However, there is a way out of this. In Chapters 5 and 6 I argued that we cannot know the extent of someone's dependence on a power relationship, nor determine the degree of the power imbalance. Therefore, philosophers and policy makers should identify 'vulnerability groups' – groups who are likely to be highly dependent on an asymmetrical power relationship, and for whom we can observe limited accountability mechanisms. Developing policies therefore requires making a judgement about likely levels of domination on the basis of certain indicators of domination. I suggested in Chapter 5 that this means adopting risk averse policies that aim to reduce the domination of the worst-off in the group.

There are four areas in which I think the goal of reducing domination can be applied. These are

increasing the accountability of the state to its non-citizen population, empowering migrants to protect themselves against exploitation and abuse, immigration policies, and citizenship acquisition. I will also argue that policy-makers should promote the non-domination of denizens by attempting to change norms and attitudes towards migrants.

Improving the accountability of states to their non-citizen population

In Chapter 6, I argued that the accountability gap inherent to denizenship is more problematic the higher a denizen's subjective exit costs of leaving the state. There is also considerable differentiation in terms of the size of the accountability gap for different groups of migrants: those well protected by the governments of their home countries through diplomatic protection or reciprocal agreements experience the smallest gap. Migrants from poor countries not well represented on the international stage or who have limited access to legal counsel because of their poverty or immigration status have the greatest. Here, I will consider a few strategies we could adopt for reducing the accountability gap.

In Chapters 5 and 6 I suggested that accountability was a threshold concept, but that in order for the threshold to be crossed so that non-domination could obtain, three different types of accountability mechanisms needed to be accessible: justification, contestation and retribution. Generally, mechanisms for controlling and checking the executive of the sort usually associated with democracies - like judicial review, regular and open elections, a free press, bicameralism, a multi-party system and so on - all increase the first and last of these. The middle one, contestation, requires that accountability is at least to some extent self-initiated or self-controlled. That is, the person subject to the power needs to have some say or sway over how it is wielded; it is not enough that it is subject to external checking mechanisms. This is what republicans have traditionally called 'voice', and it is central to the republican conception of citizenship.

I want to suggest that migrants who have low exit costs of leaving the state require a lower threshold of accountability: they do not require this third, middle element of contestation or 'voice'. Migrants in this category are those who have recently arrived and not yet built up strong emotional and social ties; and those who have decent prospects in their home country, citizenship of multiple countries, 'super denizenship' status (citizenship of an EU member state), considerable financial resources, or internationally desirable skills. In other words, they are those who could move elsewhere without significant obstacles or considerable loss. Their accountability threshold can be much lower because the coercive power of the state and thus how it both constitutes imperium and facilitates dominium is less problematic. An alternative way of describing this, following Albert Hirschman (1970), is that the state gains its legitimacy from a different source for the low-dependence non-citizen population: from exit, rather than voice. Hirschman's point is that democracy is not the only source of moral legitimacy if membership is voluntary and exit costs are low. The demand for 'voice' increases to the extent that

‘exit’ is prohibitively costly or infeasible.

Of course, even those with EU super denizenship status are likely to become highly dependent after a significant period of time has elapsed. Once they have established social ties ‘exit’ no longer becomes a viable option, or at becomes very costly. Vulnerability to domination increases with length of residence as one’s exit option diminishes. Therefore after a period of time – perhaps five years or so – all denizens will have reached a level of dependence which requires the more demanding threshold of accountability to be met, if the state power is not to constitute domination.³¹ The other precondition for this lower level of accountability to be legitimate is that there has to be an alternative agency forcing the host government to track the interests of the group of denizens in question. The requirement of ‘contestation’ has to be met through the denizen’s country of origin.

What would this lower accountability threshold entail? Generally, much of what is minimally required is necessary for promoting the non-domination of all as it pertains to constitutional and institutional design for reducing state arbitrariness. Aspects of this institutional design include morality of law conditions and the dispersal of power including constitutional features like bicameralism and judicial review (Pettit 1997: 171). As I argued in Chapter 3, enshrining the rights of non-citizens and citizens alike in constitutional rights legislation constitutes an important check on anti-immigration governments, although constitutional rights alone cannot address some of the structural disadvantages denizens are subject to.

The accountability threshold for low dependence groups also requires strong external protection from their country of residence: what Bauböck (2009) has called ‘external citizenship’. This includes adequate diplomatic protection, that is, representation from a democratic country with sufficient clout on the world stage, and reasonably responsive to the interests of its citizens in that it is a functioning democracy and grants its expatriate citizens voting rights. For denizens who do not come from western democracies, fulfilling these accountability criteria would depend on the democratisation of developing states and on them developing sufficient bargaining power on the world stage. Pettit (2010) has recently suggested that weaker states could form blocs and sign treaties in order to strengthen their reciprocal power vis-à-vis powerful states. Reciprocal arrangements concerning the movement of people between a certain partnership or group of countries modelled on the EU would also promote accountability, particularly if it enabled transnational rights directives and covenants of the sort that are produced at an EU level.

Even if external protection is effective, there may nonetheless be an accountability gap in relation to

³¹ As Carens (2002) notes, it is impossible for philosophers to determine the precise threshold for claims to citizenship or its benefits.

the local interests of migrants. Diplomatic protection is likely to be most effective at national level in response to drastic rights violations, as in the case with the interventions by governments of western states on the practices at Guantánamo Bay. There is still nothing to force *local* authorities to track the interests of their foreign residents as there is no diplomatic protection at the local level. Moreover, the democratic mechanisms to consult expatriate citizens on their interests in order to be able to promote them internationally do not exist at the local level because they are likely to have no voting rights at the local level in their country of citizenship (as generally you lose local voting rights if you move out of an area). People's interests at the local level are, in effect, less appropriate for promoting across borders. It follows that granting denizens voting rights at the local level would help mitigate the accountability gap in relation to the interests that are bound up with residence of a local community. Practically speaking this policy is also a fairly realistic one; many states currently enfranchise their denizen population at a local level.

However, it is important that in strengthening diplomatic protection the arbitrary power in diplomatic relationships is not increased. The common policy of diplomatic immunity removes effective accountability mechanisms from the staff of diplomats who are vulnerable to a range of exploitation and abuse (see Chapter 6). This practice is often in the spotlight in the UK, but as yet diplomatic immunity has not been seriously challenged. The potential harm caused by diplomatic immunity is compounded by the fact that employees of diplomats are highly dependent on their employment relationships as often their visas require them to stay with their employer if they wish to stay in the country.

For more vulnerable migrants and in particular irregular migrants, accountability mechanisms may also be *ineffective*. In the United States after 9/11 large numbers of young Muslim men were picked up and detained or deported on minor immigration transgressions, when these would usually have gone unnoticed or been overlooked. This mismatch between practice and law accords officials a great deal of discretionary power which is unchecked and is likely to be used against already disadvantaged and discriminated against groups. Moreover, when laws exist that are generally flouted this undermines the morality of law conditions described earlier. As described in Chapter 6, this is likely to lead to anxiety and uncertainty and migrants may feel they have to constantly 'watch their backs'. Powers that are inconsistently used, subject to discretion, and that disproportionately impact on certain vulnerable groups, violate 'empire of laws' criteria as detailed above.

In addition, the domination of *private* power relationships is fuelled by ineffective accountability mechanisms such as fear of being prosecuted for immigration transgressions. As I pointed out in the last chapter, this effectively puts undocumented migrants into a "state of nature" where the law does not protect them, even if in principle they are entitled to legal rights. Therefore, I would strongly

endorse Carens' (2008c) recommendation for a firewall in between immigration enforcement and law enforcement so that migrants are guaranteed not to have their immigration status questioned if they report crimes or serve as witnesses. Clearly, giving irregular migrants legal status (through what is sometimes called an 'amnesty') would also prevent this problem from arising, but this is problematic because it might incentivise undocumented migration (regardless of what a state's admission policy should be, undocumented migration is bad as it renders migrants vulnerable), and sanction 'illegal' behaviour. Although I would support a much more generous approach to irregular migration, if someone does not have the moral right to stay because they were well off in their home country, or if they have committed a serious crime, this is not an attractive option. I will consider this below in the section on immigration policies.

Highly dependent migrants require a more stringent threshold of accountability to be met. These migrants have no other choice but to be there, thus the coercive power of the state is highly dominating. High dependence is also likely to correspond to ineffective accountability mechanisms from one's state of origin. A refugee is clearly not going to have their interests tracked by their home government, and in any case the government would probably have little diplomatic influence. For those whose high dependence is the result of a long period of residence, instead, contestation mechanisms are likely to be ineffective for a different reason. While someone's interests are bound up predominantly in their state of origin it is quite straightforward for governments to promote their interests abroad as these interests are mainly about treatment as a migrant, legal protection and so on – things that governments may be able to exercise diplomatic pressure over. Once the migrant's interests are predominantly bound up in their state of residence it is less easy for their home governments to track these as they have little sway over issues of domestic policy. This gives us two reasons, then, that constitute a *prima facie* good case for denizen suffrage for the highly dependent.

Improving the accountability of states to their non-citizen population: the case of denizen suffrage

The question of 'alien suffrage' is a lively debate; several papers have been published recently (Song 2009, García Bedolla 2005, Owen 2009), as well as one book (Rubio-Marín 2000), and most prominent immigration theorists have considered the matter at least in the context of claims to citizenship. Non-citizens also illustrate the lack of fit between democratic theory and practice. They almost universally lack national voting rights, but seem to have a strong claim to them according to democratic theoretical principles which tie the right to participation to subjection, or affected interests. The disenfranchisement of non-citizens subverts the principle that 'every adult subject to the government and its laws' should have voting rights (Dahl 1991: 123), or the influential 'all-affected principle', that 'only those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity as participants in a practical discourse' (Habermas 1990: 197).

Specifying a principle for defining the demos has not been unproblematic, in fact it has given rise to the so-called 'boundary problem': the demos cannot itself be determined on the basis of democratic decision making (because to decide who should participate in such decision making would require the decision to have been made) (Whelan 1983). Ian Shapiro (2003: 52) puts it thus: '[q]uestions relating to boundaries and membership seem in an important sense prior to democratic decision making, yet paradoxically they cry out for democratic resolution'. This has been described as the 'chicken-and-egg' problem of democratic theory: democracy 'depends on a decision rule, usually some variant of majority rule, but the rule's operation assumes that the question "majority of whom" has already been settled. If this is not done democratically, however, in what sense are the results that flow from democratic decision rules genuinely democratic?' (Shapiro and Hacker-Cordón 1999: 1). The paradox is that we cannot decide who should be eligible for membership in the electorate through a vote, as such a vote would have already have had to establish who was eligible to vote in the referendum on membership (Rubio-Marín 2000, Bauböck 1994b). This, as Goodin (2007: 43) describes it, would be 'like saying the winning lottery ticket will be pulled out of the hat by the winner of that selfsame lottery'.

The all-affected principle has long been seen as the most coherent way to circumvent these problems. Its legitimacy seems self-evident: it is egalitarian and treats all interests equally, and as Goodin contends it underpins the way in which we evaluate alternative ways to assess democratic eligibility in that we consider them to be over- or under-inclusive on the basis of whether they cohere with what would be prescribed by the all-affected principle. Nonetheless, it is not unequivocal in what it prescribes. If we enfranchise all residents on the basis of the fact that their interests are affected by political decisions, why not go beyond this - most people's interests are affected by the foreign policy decisions of the United States and by their domestic policies on carbon emissions or multinationals. Goodin maintains that the principle is conceptually indeterminate: we cannot include people on the basis that their interests are actually affected as this depends on what the result is, and what the result is depends on who is included in the decision. On the other hand to include all those with 'possibly affected interests' is infinitely expansionary, 'virtually everyone would get a vote on virtually everything, virtually everywhere in the world' (56).

The principle of dependence, on the other hand, makes intuitive sense. Exit costs of leaving the state are likely to increase to the extent that someone's basic interests are bound up there. Thus it ties the idea of being eligible to vote where one's interests are bound up with the idea of justifying the coercive power of the state - it is when someone has no choice but to be subject to that coercion that democratic justification is particularly necessary. Shapiro (2003: 45) develops a similar connection between cost of exit and voting rights: the 'right to deliberative participation should vary with the degree to which people are trapped'. The advantage to the dependence principle is that unlike the all-

affected principle, it does not advocate enfranchising someone who has a strong interest in a particular party being elected but is not likely to be bound by the legislation it sets down. For example Albert Weale (2007: 153) suggests the case of a foreign visitor whose ‘degree of ... interest in the result might be considerable’ if they know that if a certain party is elected currency fluctuations will move in their favour. On my account, this foreign visitor has very low exit costs, so is not entitled to the higher threshold of accountability which grounds the right to vote.

There are, however, three compelling objections to the principle of dependence. First, a critic might observe that it takes no account of the loyalty or commitment of the denizen to their state of residence. Aside from security concerns, non-citizens might use their vote to promote the interests of their home country, or they might be more easily mobilised and without due consideration (Aleinikoff and Klusmeyer 2002). Against these points, I would counter that the integrative effects of immigrant participation would outweigh these concerns. Restricting access to the demos to denizens who display certain qualities would be counter-productive if it drove immigrant movements underground or alienated migrant communities. On a republican account, democratic involvement, even for “disloyal” groups, is preferable to excluding them from the public sphere. The potential of political participation to foster republican virtues implies not that people should be excluded from participation until they demonstrate these virtues, but that they should be given the opportunity to develop them. Indeed, there is no test for civic-mindedness for the citizenry; we would consider it wrong to debar the disloyal or self-seeking citizen from the right to vote. In fact, the lack of exit options provides a plausible explanation for why we think this would be wrong. Having a stake in a country, as I argued in Chapter 4, does not require loyalty or shared identity, but having most of, or your fundamental, interests bound up there. This seems to be the intuitive force at work in the example of the voting rights of citizens.

The second objection expresses concerns about the implementation of the principle of dependence, because it advocates giving denizens the right to vote once they have gone beyond the higher threshold of dependence. This implies enfranchising different groups of migrants after different periods of residence, which is surely undesirable as it might lead to resentment, and would appear to create a hierarchy of denizens. It would also be very difficult to measure dependence, identify the groups who met the criteria for the higher threshold of accountability, and then administer their voting rights. The room for error would also be substantial. Of course, this problem does not just arise for my model of democracy. Whatever principle underpins the case for democracy there is always a degree of generalisation in deciding who is eligible. For example the argument that excluding children is justifiable because they do not yet have fully developed capacities can be countered by the point that some children are responsible, knowledgeable and capable enough to vote in their teens,

while some adults never attain the desirable qualities (Weale 2007). Deciding who is eligible is therefore always going to involve some degree of shorthand.

One way of providing this approximation is to say that denizens should be accorded the right to vote once they have lived in the country for long enough for everyone to have gone beyond the requisite level of dependence. But I have argued that a non-domination framework recommends improving the non-domination of the worst-off in the vulnerability group. This would recommend granting voting rights to all residents, regardless of how long they have been in the country. This latter option commends itself because the republican framework grounds an over-inclusive rather than under-inclusive approach due to the concern with eliminating vulnerability. However, it would mean that the original principle of dependence is now much changed as it equates to granting the vote to all denizens regardless of their level of dependence, not because of it.

An alternative approach is something between the two. We could grant denizens voting rights once they are likely to have reached the threshold of dependence, and then supplement the accountability gap with alternative mechanisms to mitigate the domination of those who are highly dependent yet have not lived in the country for long. In addition, even imperfect enfranchisement of denizens qua denizens would substantially improve the responsiveness of governments to migrant interests, so provided some of the members of each vulnerability group were represented the accountability gap would be considerably lessened. I think that three to five years would be an appropriate amount of time, but this is difficult to set down in theory. I have suggested this timeframe because it is in between zero years, for denizens who are likely to be highly dependent from the beginning of their residence, and a decade or so, for those who may not cross the threshold until they have had children grow up here, or developed a career which is no longer transferable, or invested emotionally and psychologically in their local community.

The other reason not to enfranchise resident non-citizens from day one is that it does not take into account the goal of promoting the non-domination of all. Although I rejected concerns I raised in relation to the last objection about the commitments and capacities of denizens - including their absence of loyalty and tendency to be insular - I accept that requiring participants in democracy to have a degree of knowledge about political institutions is desirable. The citizenship education of denizens should bear similarities to that of children who grow up in the state, focusing on providing information about public institutions, rights and responsibilities. I do, however, share Carens' (2005b) concerns that the introduction of tests as a precondition for entitlements of citizenship, or citizenship itself, are likely to be disproportionately felt by disadvantaged groups. Therefore, an emphasis on

education rather than tests is probably desirable.³² At the minimum, the process of registering to vote could involve a website where voters needed to click through a certain number of pages before getting to the page to register, or the provision of information pamphlets.

But why grant voting rights to denizens at all, rather than citizenship? This third objection cuts deeper than just the denizen suffrage aspect of my theory as it questions why we should focus on securing denizenship as a status of non-domination rather than ensuring that exit from denizenship is fair and obstacle-free. The findings of Chapter 6, that domination is increased to the degree that denizens have costly exit from denizenship as well as from the state, also provide support for this view because reducing the costs of leaving denizenship would reduce domination. However, imposing any conditions on acquiring citizenship is likely to result in different levels of dependence on denizenship as financial costs, language requirements and so on affect people differently. Some conditions are also outside of the host state's control as they pertain to the citizenship policy of the migrant's state of origin (for example whether they would lose their citizenship there). Moreover, some migrants choose not to become citizens because they do not feel they have a sufficient stake in or attachment to the country. They are entitled to non-domination independent of this choice. Conferring automatic citizenship after five years or so would, on the other hand, be problematic; it would be unfair to impose responsibilities of citizenship on people who do not have a stake in their country of residence and have not consented to them, while it might lead to losing their citizenship elsewhere.

Furthermore, to the extent that denizenship is not a status of domination, it becomes more legitimate to impose more stringent requirements on naturalisation. This should be appealing to republicans: if migrants acquire citizenship not for its benefits but because of the understanding that it represents full membership and certain additional responsibilities (legal requirements like jury service and so on, but also less concrete norms of citizen-like behaviour) they are more likely to take it seriously, and it will become possible to impose certain requirements that can encourage strong citizenship and support civic virtue.

Of course, this is conditional on the status of denizenship not being a state of domination, and more needs to be said to explain how this could be possible. In part, this entails protecting migrants against the private domination they are particularly vulnerable to.

Empowering migrants to protect themselves against exploitation and abuse

The second group of policies relates to the socioeconomic goods that ought to be accessible to denizens in order to reduce dominium. Socioeconomic independence is important for two reasons.

³² A similar argument is made by James Hampshire (2009) although in relation to citizenship acquisition, rather than voter education.

First, because it puts ‘certain undominated choices within my reach’ or lowers ‘the costs of pursuing those choices’ (Pettit 1997: 159). Second, because being unable to get by in ‘ordinary day-to-day circumstances’ puts me in a position where ‘the unscrupulous are in a position to make free with me. Banking on my ignorance of relevant standards and expectations, they may mislead, manipulate, and exploit, almost without check’ (159). As Michael Walzer (1983: 195) observes, ‘[p]rivate charity breeds personal dependence... and then it breeds the familiar vices of dependence: deference, passivity, and humility on the one hand; arrogance on the other’. Pettit therefore advocates basic capabilities, as proposed by Amartya Sen (1992). These, for Pettit (1997: 158), include literacy, basic skills, access to information about work opportunities, medical facilities, transport, information about how to deal with authorities and services and means of getting about in your local environment. We can add to this list a range of other benefits provided by most liberal states, including child benefit, welfare rights for those unable to work because old, ill, or disabled, and unemployment allowances.

It is easy to see the value of these benefits for migrants. The guarantee of socioeconomic independence would, for instance, prevent migrants from having to stay in exploitative jobs because the alternative is destitution. Social welfare provisions ‘shift the relative bargaining power of workers and employers’ because they provide people with an alternative so that jobs have to be offered at a market rate. Providing migrants with such benefits would prevent them from having to take jobs at lower than market rate because they have no other choice (Carens 2008b). Similarly, provision of social housing prevents vulnerable migrants from having to rely on charities or favours from informal immigrant networks.

Nevertheless, it might be legitimate to restrict migrants’ access to some of these benefits, at least for their first few years of residence, for certain groups. Pettit allows that what is necessary for socioeconomic independence for one person may not be necessary for all; a considerable degree of differentiation is expected. Even more differentiation is permissible for migrants, as those who have not crossed a certain threshold of dependence on the state could seek opportunities elsewhere. What is necessary is a certain minimal level of socioeconomic independence rather than the rather fuller package of welfare rights that citizens and the highly dependent require. This is because if they found themselves with a choice only between a set of exploitative employers, for example, someone with high exit costs would *have* to take one of these opportunities, whereas someone with low exit costs could move to another, or their home, country. However, the sort of means testing necessary to determine someone’s dependence and needs would give the state a large amount of discretion, and as Lovett (2010: 198) says ‘it will not do to replace the arbitrary charity of private individuals and groups with the arbitrary charity of state welfare agencies’. It follows that erring on the side of caution would suggest that all migrants should be given full socioeconomic rights, but in a situation of scarce resources it might be legitimate to restrict access to those who do not have citizenship of a liberal

democracy elsewhere for the first few years of residence.

However, I doubt that even the low exit costs of certain groups of migrants could justify making them pay for access to otherwise universal health care, or restricting access to public education for their children. Even if someone could leave the country at any time, having to pay for medical services or take out health insurance would have a disproportionate impact on poor migrants. Moreover the temptation to gamble and not take out medical insurance might be great, as has been the case in the United States, for less well off migrants. If they were to have a medical emergency they would find themselves in need of a considerable amount of money and this kind of unpredictable cost might force them into exploitative relationships in the black economy.

High priority for a non-dominating policy approach would be eliminating the ‘catch 22’ situations that migrants experience. For example in Chapter 6 I described how women on dependent spouse visas who are victims of domestic violence are particularly vulnerable to domination as they are unable to seek recourse from public funds. Yet in order to be eligible to put in a visa claim independently on the basis of their partner being violent they have to prove that they have accessed public services such as shelters. In Chapter 6 I described research which examined domestic violence cases for migrants from developing countries who had entered arranged marriages. For some women the exit costs of leaving the country – which is what leaving their partner would effectively require – are too high to risk leaving the relationship, because of the social stigma and financial loss suffered in returning home. This demonstrates that making public services inaccessible to migrants can be dangerous even if they have recently arrived. It suggests that either we should err on the side of caution and treat all migrants as having crossed the dependence threshold where full social rights are necessary even if they have recently arrived, or make certain public services like domestic shelters universally accessible. The latter is surely the minimum that should be done in this case.

Immigration policies

I have considered the way in which immigration status influences domination, and the ways that this could be mitigated. But what would a domination-reducing approach say about immigration policies? In Chapter 2, I argued that irregular migrants in that they are physically present in the state yet lack the right to stay, raise some of the most difficult questions in immigration theory. Immigration policy connects the question of open borders with the principle of non-domination, therefore it is of considerable interest for present purposes.

First, a domination-reducing approach would prescribe a much broader definition of ‘refugee’ than set out in the Geneva Convention. I argued in Chapter 2 that individuals without citizenship of anywhere have the strongest claim to membership, but that destitute migrants too have the right to a decent life.

To the extent that states have played some role in causing their destitution, or to the extent that their global obligations are unfulfilled, duties to those who have migrated become ‘assigned’ duties that were previously unassigned. This leads to two principles for destitute or persecuted migrants. First, returning *anyone* to a situation where they face persecution or possible death would be impermissible. This is a non-negotiable principle. Their exit costs of leaving the state are extremely high, higher even than that of a citizen in most cases. Second, returning those who have dismal life chances in their home country is wrong insofar as states have not lived up to their global duties. This is a conditional argument. This means that in the unlikely scenario that a state had fulfilled its global duties it would be entitled to deport or bar from entry migrants who only had a dismal chance of life elsewhere (but not no chance at all, in which case they would come under the first category).

However, deportation of undocumented migrants is only permissible when their exit costs have not crossed a particular threshold, even for states who have lived up to their global obligations. If they have lived in a country long enough to have made considerable social ties, the argument no longer holds. This supports a policy of deporting undocumented migrants and failed asylum seekers as soon as is practically possible. It is not permissible to allow bureaucracy and administrative errors to result in someone being deported after they have been able to establish deep social links. It might be said in objection to this that someone who has poor life chances has very high exit costs; thus it would seem from my framework that they should be allowed to stay. But I would contest the fact that exit costs can be that high if someone has recently arrived - their exit costs pertain not just to returning home but also to the opportunities they face elsewhere. Moreover, the fact that they do not yet have a specific connection to the state of residence means that they do not have the kind of deep connection that someone who has lived here for a substantial period of time has.

I therefore recommend that after migrants surpass a certain threshold of dependence they gain leave to remain, even if they are undocumented. This principle is already accepted in most liberal democracies - if you have lived in a country for long enough you get the right to remain, and undocumented migrants are sometimes legalised. But the principle is wider than this: if we take it to its full conclusion migrants who are highly dependent from day one ought to be granted leave to remain. This means that, for example, the relatively new UK practice of granting refugees “exceptional” or “limited” leave to remain rather than “indefinite leave to remain” once their asylum claims have been accepted is wrong. A domination-reducing framework would recommend granting refugees the right to permanent residence in order that they can make life plans, take out mortgages, invest in their career, and make solid social ties; rather than living in a state of limbo and uncertainty. Having a temporary visa not only impedes life plans but exposes migrants to the potential for exploitation and means that they live a life full of uncertainty. This kind of uncertainty would be tolerable so long as someone knew they had a perfectly good alternative life somewhere else, but if

this was effectively the only alternative, it would be unduly burdensome. Acquiring leave to remain should also be relatively cost-free; using visa charges as a deterrent to applications is not a legitimate practice.

Clearly, undocumented migrants are the most problematic group here, as they have come to this country without consent. The dependence principle supports the regularisation of such groups after a significant period of time. However, the question is whether the fact that they have come here illegally should make a difference – should the period of time be longer? I think not. If they truly have high levels of dependence (which implies more than just slightly inferior opportunities elsewhere), then they ought to stay, just as other migrants. The problems with incentivising undocumented migration are obviously considerable, and I cannot fully answer these objections here – indeed most immigration theorists do not consider the implications of arguments for more open borders, for example, when clearly such a policy would greatly incentivise immigration. But one response is that someone would not choose to live their life in the black economy and in such a position of vulnerability unless it seemed to be their only option. Provided they have not committed crimes,³³ that they have chosen to do this is testament to the fact that they had no other option, as I said earlier in response to the consent objection. If so, then I cannot see that regularising undocumented migrants after ten years of living in this state of domination would be attractive enough to incentivise it to those who might otherwise not become irregular migrants.

Finally, the principle of dependence would recommend stopping the deportation of foreign prisoners once they have gone beyond a certain level of dependence. In Chapter 4 I examined Carens' argument about the wrongness of deporting people who have lived in the country all their lives, and then since childhood, and then for a substantial period of time. I endorse his view. Once those convicted of crimes have crossed the threshold of dependence they ought not to be deported after they are released. This can also be justified on equality of law terms: such a practice would be double punishment, which does not fulfil the condition that law ought to treat like cases alike.

Approach to citizenship acquisition

So far, I have only assessed ways in which to promote non-domination in the status of denizenship. However, another way of reducing the domination of denizens is to remove obstacles to becoming a citizen. I have said that these two approaches can be balanced against each other; the more resilient a status of freedom denizenship is, the less urgent it is to reduce barriers to citizenship. Moreover, I want to suggest that the state is entitled to take steps to make citizenship difficult to acquire to the extent that they have improved denizenship. For example, if a state permits denizen suffrage it will be

³³ Beyond, perhaps, light stealing and begging which might be understandable to many people given certain circumstances. Most people's concerns about undocumented migrants are to do with organised, serious crime.

more legitimate for it to restrict access to citizenship. Therefore, the suggestions that I make here are conditional: they depend on what other practices have been adopted. The general point is that if citizenship is not the precondition for non-domination, and to the extent that denizenship is a status of non-domination, the more latitude states have to set higher obstacles to citizenship acquisition. Moreover, my framework permits states to adopt whichever alternative is compatible with their current policy, cultural goals, and history and tradition. If states wish to make citizenship a hallowed status that is difficult to acquire and thus increase the dependence of denizens on staying in the status of denizenship, they need to ensure that denizenship is not a status of domination.

Nevertheless, there are limitations to this: because some of the goods of citizenship are cannot be disaggregated from the status, beyond a very high level of dependence (higher than that that justifies the need for suffrage) even the small distinctions between citizenship and denizenship become problematic. Some of these goods are legal rights, like the right to travel freely internationally and the right to diplomatic protection abroad. Others are less measurable, including the intersubjective benefits that Pettit highlights and that I discussed earlier. The former are not necessary conditions of non-domination as they do not pertain to the institutions of the state. But simply having fewer rights than citizens, even if not strictly the sort of rights required for non-domination, consolidates the hierarchy between citizens and non-citizens. Moreover, having the right to travel freely including visit one's family is an important part of living a full life. I am therefore sceptical that without formal citizenship the full extent of non-domination will be possible. Even if many of goods of citizenship including socioeconomic rights and political participation have been disaggregated from its role as a formal status, the intersubjective benefits that come with being a full member of a community are more difficult to extend. Moreover, they are unlikely to be the sort of things that can be legislated for, but are to do with mutual recognition amongst citizens of their shared membership.

We should therefore reduce dependence on the status of denizenship by decreasing obstacles to acquiring citizenship unless they track the public good (and not just the public good of the citizenry). Barriers to citizenship should be minimal and non-arbitrary and should not impose disproportionate burdens on certain groups. We should also minimise the discretionary power of officials, that is, the power to make subjective judgements rather than being bound by external rules. What does this mean in practice about the contentious issues of citizenship tests, language stipulations, and so on? Everyone, including denizens, would benefit from denizens fulfilling a certain threshold of language requirements. Generally, however, it would be better for the government to provide the means for denizens to get to a desired level of language attainment rather than impose a condition that they demonstrate such a level. This is because these conditions increase the dependence of denizens on citizenship, but are likely to fall disproportionately on the uneducated or badly off (because they have to work longer hours to make ends meet) who have higher exit costs of leaving the state. The

combination of dependence on denizenship, and dependence on remaining in the state, increases the level of domination these groups are subject to.

Note that on this account it is the fact that such barriers would leave many groups effectively dominated, rather than the content of the proposals as such, that make obstacles good or bad. This means that language tests are not inherently less problematic than citizenship tests, although the former are often thought to be due to their ‘cultural’ content. But for both, promoting the development of these capacities is more desirable to making them preconditions of acquiring citizenship.

Generally therefore a domination-reducing policy approach to citizenship acquisition would support the promotion of certain attributes and virtues through positive reinforcement rather than making them conditions of citizenship acquisition. Aleinikoff (2000: 166) argues that, ‘[c]oncern that persons are naturalizing without an adequate knowledge of the English language or U.S. history is rarely coupled with proposals that public funds be spent on ‘citizenship education’ for immigrants’. Encouraging strong citizenship could sensibly take the form of encouraging voluntary service and providing public education rather than restricting access to citizenship. Imposing large costs on acquiring citizenship that are much greater than the administrative costs involved, are similarly ruled out by my account. Moreover, a domination-reducing approach would recommend providing disadvantaged migrants with the opportunity to stagger their payments (and indeed any immigration-related payments) in order to reduce dependence. On the other hand, it would not recommend having no barriers at all to acquire citizenship provided these did not fall on disadvantaged groups and that they were in the public interest. Changes in Britain to require migrants to carry out voluntary work in order to accumulate enough points are probably acceptable provided they do not disproportionately affect the disadvantaged.

Finally, my framework would rule out citizenship acquisition policies which might have the effect of increasing the level of domination inherent to denizenship. I have in mind policies like the Earned Citizenship proposals in the UK where participation in certain pressure groups, or evidence of having protested against the government, count against a migrant in their case to naturalise. Anything that might cause a “chilling effect” in relation to the rights attached to denizenship increases the vulnerability to domination inherent in denizenship.

Cultural norms

Of course, acquiring citizenship alone does not make someone non-dominated. The final area of “policy” is not an area of policy as such, but an important goal that every state which aims to promote non-domination in relation to its denizen population should adopt. So long as social norms exist

which prioritise citizens above non-citizens simply by virtue of their status, denizens will not be able to enjoy a status of full non-domination. The problem with these norms is that they are fundamentally about status; about the status of citizenship being one of privilege and superiority. *Whatever* the rights that are attached to denizenship, if people think that being a non-citizen makes you less eligible for the components of a decent life simply by virtue of your status, you will suffer. Of course, if the case was made that certain groups of denizens should have less priority in public services because of their lower exit costs this would be quite reasonable. But to the extent that it is an acceptable argument to say: you are entitled to fewer benefits because you are not a member, then there will be a gap in social norms that makes you vulnerable to exploitation and abuse. Lovett (2010) develops the idea of gaps in social norms in his account of arbitrariness; arbitrary power is where there are insufficiently developed legal and social norms to check power. So even if migrants have access to public housing, the subtle prejudices of housing officers might lead to them inadvertently promoting the interests of citizens. Or even if they have equal employment rights, the culture of violating these rights in certain sectors popular to migrants, as I discussed in the last chapter, means that accountability is in effect quite limited. As Mouritsen (2006: 19 his emphasis) emphasises, citizenship is about a 'social and subjectively felt *expectation* that one's liberty will be respected by others and by the state'. Being a rights-holding denizen can only do much if denizens are led to believe that they are of an inferior status; they may develop adaptive preferences which lead them to think they are not entitled to their rights or come to expect less favourable treatment which would make them unlikely to speak out if they are maltreated.

Similarly, popular discourse embodies and solidifies these norms so that it becomes commonplace to at least mention the fact that non-citizens are 'different', even if the outcome of political debates or legal rulings is in their favour. For example, complaints about the Human Rights Act protecting 'asylum seekers and terrorists' are common in the tabloid press but in more subtle ways that the rights of non-citizens are contested is highlighted even by those who support their human rights.³⁴ Or on the playground, the use of the term 'asylum seeker' as a term of abuse reinforces not only prejudice but also the status dimension of being an immigrant.

What could mitigate these factors? Pettit (1997) points out that the effect of formal state initiatives is limited, and emphasises the role of trade unions, consumer movements, protest groups, minority rights associations and so on. Social sanctions can often be as effective as the threat of legal punishment, and these are the result of changing norms. Migrants' rights associations are clearly crucial to this, but the government could also refrain from contributing to the gap in norms which

³⁴ I have in mind things like the repeated calls by public figures to 'save the Human Rights Act' at the beginning of the UK 2010 Conservative and Liberal Democrat coalition government (when repealing it was not even in the coalition agreement).

makes it acceptable to describe membership in the group of non-citizens as a valid reason for their differential and inferior treatment. Of course it is hard for policy-makers to do anything about these endemic, institutional social understandings about the entitlements of different groups.

In conclusion, I have argued that a domination-reducing policy approach will generally recommend overinclusiveness in regard to policies, including socioeconomic rights and voting rights. Nonetheless, in situations where overinclusiveness is undesirable because it would jeopardise or undermine the ability of these institutions to promote non-domination for all, it is legitimate to set policies for the majority of the vulnerability group, not the worst-off, and then targeted policies can be adopted for the worst-off. A policy approach inspired by non-domination would encourage naturalisation but not impose it as a condition of non-domination, would reduce barriers that fall on some groups but not others, and would ensure that conditions did not increase the vulnerability to domination inherent to denizenship. This is, of course, an ideal wishlist, not a blueprint I expect governments to implement in its entirety. One of the advantages of my model is that it says that reducing domination is always a good thing to do, but provides various ways this can be achieved. Even if all of the policies recommended here are not followed, any one of them would reduce the domination of denizens, and would therefore be preferable to current state practice in most liberal democracies. In the next, and final section, I will evaluate this and the other benefits of my approach and how it contributes to immigration and republican theory more generally. I will identify three advantages, and two objections.

IV: Evaluation of a Non-Domination Theory of Denizenship

The first advantage of my framework is its contribution to providing a normative language for expressing grievances. One of the main contributions of domination theory, according to Pettit (1997: 131), is that it introduces a ‘medium which enables those in every quarter of the society to give a satisfying articulation of their particular grievances and goals’. I hope to have shown that it provides such a language not just for ‘established’ members of society, i.e. citizens, but also for those at the fringes, non-citizens. Domination furnishes a rich nomenclature for articulating the problems faced by migrants that is able to articulate experiences of powerlessness, lack of choice and control, experiences of insecurity and volatility, and uncertainty in the immigration process.³⁵ It provides a coherent, singular way of expressing these divergent experiences and also a way in which to express them as moral wrongs, rather than descriptive features of immigration. The alternatives for making normative judgements about the immigration experience - saying that it is unfair or unjust for example - would not capture these subtle dimensions. In addition, non-domination provides a *metric* for evaluating policies, and one which can show why there might be multiple alternatives. It suggests that

³⁵ See e.g. (Edgar et al. 2004) for a book-length treatment of these sorts of concerns (but not seen through the prism of domination).

we should not just liberalise everything; for example we should not just shave off as many years of residence as a precondition for citizenship acquisition as is politically expedient, it can make moral judgements about the relative advantages and disadvantages of policies that allow a considerable degree of latitude for states to set their own policies. Although much of the work here is yet to be done, I hope I have set out some of the ways in which it *could* be done.

This links to the second advantage, which is the model's fit with many of the intuitions of immigration theorists, and I hope, ability to respond to some of the objections that have been raised against them. For example, the model integrates Carens' (2005) intuition about length of residence being correlated with the degree of harm that would be caused by deportation, but builds on it in what is hopefully a useful and illuminating way. Moreover, it is compatible with the principle of 'external citizenship' which shows why sometimes residence is not directly correlated with social membership (Bauböck 2007). The domination framework also supports the arguments made by commentators who emphasise the extent to which immigration status is a predictor of vulnerability (Edgar et al. 2004, Martiniello 1994). Finally, it may even provide a new way of understanding the intuition about the moral difference that citizenship makes through the principle of dependence.

The third contribution my model makes is to republican political theory. First, I hope to have demonstrated one way in which it can modernise and respond to some critics of republicanism who, in Goodin's (2003: 73) words 'were right to have a look' and 'right to reject'. It has not been my main aim to evaluate the republican revival, so I have not considered the contribution of republicanism beyond its insight on denizenship. However, the fit of republican principles with modern conditions of pluralism is one of the main concerns of its proponents and critics. By showing that republican values can be applied convincingly to immigration theory, I hope to have shown that republicanism is neither an 'archaic rhetorical skin for a body of modern liberalism' or 'overtly oppressive to a troubling degree' (Brennan and Lomasky 2006: 222). My second ambition in relation to republican theory is that I have added something to the theory of domination. My definition of domination borrows considerably from Pettit and Lovett, however I think that it is highly original in one way: by adding an additional layer of exit costs of leaving the state. Lovett's conception of exit costs is limited to personal relationships, and he does not consider how dependence can make imperium more or less dominating. I have also argued that this 'top-level' dependence can amplify dependence on private relationships. This multilayered conception of dependence makes a novel contribution, which I hope to build on in future work.

Nonetheless, there are significant limitations to my framework. I have considered many of these already throughout this chapter. I have two additional groups of objections to consider, of a very different character. The first questions the ideological basis for my theory of denizenship, specifically,

the republican approach endorsed here. This objection sees the republican framework as *superfluous*. Given that many of my conclusions and recommendations bear such similarities to those of liberal immigration theorists, and in particular Carens, what is the contribution made by getting to them by different means? In response, I think it is a virtue of my account rather than a hindrance that liberal immigration theorists may be sympathetic to many of the conclusions that I come to. It is true that many of my concerns about the way in which temporary visas facilitate exploitation and dependence are similar to Carens', but my model can account for more subtle effects of dependence and provide a coherent way to draw these together. Moreover, I think my model is distinctive enough and goes further than liberal thinkers in many respects, for example by drawing a link between exit costs of leaving the state and the way in which these sorts of visas facilitate exploitation.

The other limitation is one of scope. First, my framework has not examined the issue of denizen children.³⁶ Although I have not had space to examine the issue of children of denizens in full in this thesis, it should be noted that they are compatible with my framework which would find them to be amongst the most vulnerable. Children's interests are supposed to be represented by their parents, who are themselves vulnerable to domination. It seems likely, therefore, that my framework would find the status of the children of denizens morally troubling in a way that fits with our intuitions and the type of arguments that are often made in political discourse against for example the detention of immigrant children. However, one of the arguments that is often made in relation to children is that they do not deserve less favourable treatment than citizens because unlike their parents they have not chosen their status as denizens. This provides an interesting link to the consent objection I raised earlier in this chapter. If the intuition that children are more entitled to citizenship status (or equal rights of citizenship, or a non-dominating status, or however we wish to put it) is well-founded, then does this imply that their parents are less entitled because they have chosen their situation? I have also not discussed the issue of family reunification, and I am unsure as to how this would fit into a non-domination framework. Children and families are therefore an important avenue for future research.

The second limitation of scope is that I have not considered how we could improve the non-domination character of institutions for everyone, or more broadly considered questions of how to promote the non-domination of citizens. Clearly I do not think that citizens are necessarily non-dominated; I have said as much in my rejection of the view that citizenship and non-domination should be considered to be equivalent to one another. Nonetheless, I have not been able to explore questions like the form of democracy that would best promote non-domination, or the extent to which rights should be enshrined in constitutional documents, beyond examining the application of these questions for denizens. This was, unfortunately, a necessary limitation of my thesis. A related

³⁶ Thanks to Gideon Calder and Kristina Wollter for pointing out the interesting dimensions of the problem of denizens' children.

avenue of research is new citizens and domination, as even if migrants acquire citizenship this may be invisible if they are from an ethnic minority, or they speak with an accent. I have not discussed the way in which minorities are vulnerable to discrimination and abuse, which is a significant limitation of my thesis.

All things considered, I hope that my theory of denizenship has offered a novel approach to immigration theory, as well as provided some avenues for future research. I also hope to have challenged the way of thinking that sees citizenship as a privileged status by interrogating the distinctions between citizenship and denizenship within borders, as well as between – as has been the subject of much global justice work in political theory in the last few decades. Most of all, I hope to have demonstrated that denizenship is a worthy topic of research, and I would like it to move higher onto the agenda for political theorists to consider.

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